A

TREATISE

ON THE

LAW OF EVIDENCE.



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OF THE INNER TEMPLE, BARRISTER AT LAW.

FOURTH EDITION,

WITH CONSIDERABLE ADDITIONS.

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ADVERTISEMENT

TO

THE FOURTH EDITION.

SINCE the last edition of this Treatise has been out of print, the Author has employed much of his time in endeavouring to render it more complete. He has carefully reviewed it, and introduced, in several parts, some subjects of importance, which before had been either omitted or only slightly touched. Many other additions have been also made, which he hopes will be thought to have improved the work.

In the Advertisement to the last edition, the Author expressed an intention of introducing a chapter on Evidence, with reference to Particular Issues in the several Forms of Action. But it appeared, on consideration, that to insert a chapter of that nature, which must necessarily be one of minute detail, would materially alter the character of the present treatise, of which the great object has been, not so much to inquire minutely into particulars, as to take a general view of the system of the Law of Evidence; entering occasionally into details, for the purpose of illustration. It would also be impossible, in one or in several chapters, to do justice to so extensive a subject. Upon the whole, there-

fore, it appeared most advisable to leave the plan of the present volume untouched; and, if the Profession will excuse an additional volume, he proposes, in that form, to undertake the subject. He has already composed a great part of this new work, and hopes to complete it in the course of the ensuing year.

INNER TEMPLE,
Dec. 16. 1819.

PREFACE

TO

THE FIRST EDITION.

In offering to the Public the following Treatise on a subject, which has already been considered by writers of experience and ability, the Author fears that he may be thought presumptuous. He trusts, however, that he will be forgiven, when it is recollected, that the subject, although it has excited so much attention, is yet one which is not easily exhausted, and with regard to which the practice of every day must constantly supply fresh materials for observation. Among the works on the Law of Evidence, the one most generally approved is that of Mr. Peake; and the present writer feels himself gratified in this opportunity of acknowledging its merits.

The Author regrets, that he is unable to add more cases to those already published. The notes of the case of Brown v. Fox, of the Berkeley Peerage case, and of Wiltzie v. Adamson, have been supplied by the kindness of friends; and for the manuscript notes of the following cases, R. v. Tucker, R. v. Croker, R. v. Cole, and R. v. Hodgson, he is indebted to an authority, on which the Reader may entirely

rely. The reported cases, which are numerous; but none are mentioned, which have not been carefully examined.

Since the former part of this work has been printed, several cases connected with the subject have been reported; they did not, however, appear of sufficient importance to be added in an appendix. With respect to a passage in the third chapter, on the incompetency of witnesses who have been excommunicated, it will be proper to observe, that in consequence of a late act of parliament *, which abolishes the sentence of excommunication for contempt, no disability of this kind can any longer exist.

The following pages are submitted to the public, with much diffidence and anxiety. The Author feels, that many imperfections will be observed; and some, which, perhaps, more experience might have enabled him to avoid. He is conscious, however, that he has used every endeavour to render his work not unworthy of the public eye, and that he has devoted to it his time and utmost attention.

* Stat. 53 G. 3. c. 127.

MIDDLE TEMPLE,
June 14, 1814.

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ERRATA.

Page 221. Note (1) *for* 11 East, *read* 2 East.
287. Note (*) l. 8. *for* from, *read* some.

ADDENDA.

Page 95. Note * *add*, As to these cases, see Brandram v. Wharton, 1 Barn. & Ald. 467.

216. to the cases in note (5), *add*, Walters v. Mare, 2 Barn. & Ald. 756.

227. to the cases in note (1), *add*, Swallow v. Beaumont, 2 Barn. & Ald. 765.

316. Note (1), *add*, See also the MS. cases, stated in 5 Price, 202.

Note (2), *add as follows*: The Court of Exchequer decided, in the case of the Attorney General v. King, 5 Price, 195. that a record of condemnation of goods, proceeding upon one act of parliament, is not evidence with respect to the commission of an offence, charged under another act. And Mr. Baron Wood held, (p. 211.) that the record, if admissible at all, could not be admitted as proof of any immaterial allegation, which might be contained in the record. See also p. 309. suprà.

A

TREATISE

ON THE

LAW OF EVIDENCE.

PART THE FIRST.

THE arrangement, which has been adopted in the following Treatise, is, that which appeared the most simple, and perspicuous. The work consists of two parts; the former relating to parol or unwritten evidence; the latter, to written evidence. The subject of the first chapter is the method of compelling the attendance of witnesses for the purpose of being examined; and the five succeeding chapters treat of the causes, which render witnesses incompetent. In these, the writer has inquired into the several objections to witnesses, arising from want of reason or understanding, from defect of religious principle, from conviction of certain crimes or from infamy of character, from interest, and lastly that arising from the relation which subsists between a client and his counsel or his solicitor. After ascertaining whether the witness is competent to give evidence, the next question, that arises, is, what evidence ought to be given, and how the witness ought to be examined. The seventh chapter, therefore, treats of the general nature of proofs; and the eighth, of the regular mode of examining a witness. And the first part then concludes with an inquiry into bills of exception and demurrers to evidence.

Plan of the work.

The second part, which relates to written evidence, treats of records, of the admissibility of verdicts, and judgments, and other judicial proceedings, and of the manner in which they are to be regularly proved. Public writings, not of a judicial nature, and the inspection of such writings, are next considered: after which, follows an inquiry into the proof of private writings, the requisite of stamps on written instruments, and, lastly, into the admissibility of parol evidence by which written instruments may be explained or varied.

CHAP. I.

Of the Attendance of Witnesses.

Attendance in civil cases.

THE process, which courts of law have instituted for the purpose of compelling the attendance of witnesses, is by the writ of subpœna *ad testificandum*. This writ commands the witness to appear at the trial to testify what he knows in the cause, under the penalty of 100l. to be forfeited to the king. (1) And the stat. 5 Eliz. c. 9. s. 12. gives an additional remedy by enacting, that " if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending there, and having tendered to him according to his countenance or calling such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed,) do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10l., and yield such further recompence to the party grieved, as, by the discretion of the judge of the court, out of which the process issues, shall be awarded."

Payment of expences.

No witness is bound to appear in civil cases, unless his reasonable expences, for going to and returning from the trial,

(1) See form of this writ, on a trial, in Tidd. App. p. 331.; and on a writ of inquiry, p. 241.

and for his reasonable stay at the place, be tendered him at the time of serving the subpœna; nor, if he appears, is he bound to give evidence, 'till such charges are actually paid or tendered (1), except he reside within the weekly bills of mortality and be summoned to give evidence within them, in which case it is usual to leave a shilling with the subpœna ticket. (2) The necessity of this previous tender arises from the special provision in the act of Elizabeth before cited.

Expence of witness from abroad.

If a necessary witness is brought over from a foreign country after the commencement of an action, and gives evidence at the trial, the reasonable expences of his passage over, and of his subsistence here pending the action, will be allowed on the taxation of costs. This point was determined by the Court of Common Pleas in the case of Cotton v. Witt (3); in which case, it may be proper to observe, an application had been made to the opposite party for his consent to the examination of the witness on interrogatories, which had been refused. In the taxation of costs in that case, the expences of the witness's return to his own country after the trial were not allowed. According to the report, little notice appears to have been taken of that point; and no reason seems to have been stated for making a distinction between the expences of the passage over to this country and those incurred on the return. The allowance of expences in the case of foreign witnesses is from analogy to the common case of witnesses resident in this country; and there, on the taxation of costs, the expences are allowed for the witness's return to his place of residence, as well as for his journey to the place of trial. And it appears now to be the settled rule, both in the Court of King's Bench and the Court of Common Pleas, when a witness is brought over from a foreign country, (whether

(1) Chapman v. Poynton, 2 Stra. 1150. 13 East, 16. n. *a*. S. C., more fully stated. Bowles v. Johnson, 1 Blac. Rep. 36. Fuller v. Prentice, 1 H. Blac. 49. Hallett v. Mears, 13 East, 15. Ex parte Roscoe, 1 Merivale, 191.

(2) 3 Blac. Com. 369. Tidd. Pr. 848.

(3) 4 Taunt. 55. Sturdy v. Andrews, 4 Taunt. 699.

brought after the commencement of an action, or before its commencement, provided he is brought over bonâ fide for the purposes of the particular action,) that the expences both of his coming to this country and of his return ought to be allowed in the taxation of costs. (1) With respect to compensation for loss of time, the general rule is, that it ought not to be allowed; but it would be too much to state positively, that there are not some cases in which it may be properly granted. (2)

Service of subpœna.

As only four witnesses can be included in one writ of subpœna (3), several writs are frequently necessary. In order to save expence, it is settled, that leaving a ticket, containing the substance of the writ, will be as effectual as the writ itself; but the writ ought to be shown. (4) The writ or ticket should be served personally on the witness (5), and in reasonable time before the day of trial, that he may suffer the less inconvenience from his attendance on the court. (6) Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too short. (7) If the witness, whose attendance is required, be a married woman, it will be necessary to serve the subpœna upon her personally, and the tender of the expences should be made to her and not to her husband. (8) If a cause appointed for one sitting be made a *remanet*, the subpœna must be re-sealed and re-served. (9)

(1) Tremain v. Faith, 6 Taunt. 88. 1 Marshall, 563. S. C.

(2) Moor v. Adam, 5 Maule & Selw. 156. Compensation for loss of time was refused, in this case, to two merchants, who came from abroad as witnesses. In another case, it was refused to two merchants, who came from Newcastle; Lowry v. Doubleday, 5 Maule & Selw. 159. (b.) Lord Ellenborough, after citing the last case, added, "he believed the practice had been to make allowance to medical men and attornies, but not to others."

(3) Cowp. 846.

(4) Goodwin v. West, Cro. Car. 522. 540. Maddison v. Shore, 5 Mod. 355. S. P. See form of ticket, on writ of inquiry, in Tidd. App., p. 241.; and on trial, p. 331.

(5) Smalt v. Whitmill, 2 Stra. 1054. Wakefield's case, Rep. temp. Hard. 313. S. P.

(6) Hammond v. Stewart, 1 Stra. 509.

(7) 2 Tidd. Pr. 848.

(8) Cro. El. 122. 1 Jon. 430. S. P.

(9) Sydenham v. Rand, 24 G. 3. K. B., cited from MS. in 2 Tidd. Pr. 846.

If a witness, who has been duly served with the writ, and has had a tender of the reasonable expences, omit to attend at the trial without a sufficient cause, he is liable to be proceeded against in one of three ways: 1. By attachment for a contempt of the process of the court (1); 2. By a special action on the case for damages, at common law (2); 3. By an action on the stat. 5 Eliz. c. 9. s. 12. for the penalty of 10l., and also for the further recompence recoverable under that statute. This action for a further recompence will not lie, unless the amount has been previously assessed by the court, out of which the process issued: neither the jury nor the judge at nisi prius being competent to make the assessment. (3) When the assessment has been made, an action of debt will lie.

Non-attendance of witness.

The more usual course is to proceed by attachment. And in order to ground this summary mode of proceeding, it is not only necessary to show an ill motive in the witness, or negligence and inattention to the process of the court, but also to prove that the witness was personally served (4), and that his reasonable expences were paid or tendered at the time of the service of the subpœna. (5) It has been laid down, that it is not the practice of the Court of Common Pleas to grant an attachment against a witness for non-attendance, but that they leave the party injured to his remedy at law. (6) However, several cases (7), in which that court has refused an attachment under special circumstances, clearly show, that the general rule is the same in the Common Pleas as in the Court of King's Bench.

Attachment.

The witnesses, as well as the parties in a suit, are protected by courts of justice, and privileged from arrest, *eundo, moran-*

Privilege from arrest.

(1) 2 Ld. Raym. 1528. 1 Stra. 710. 2 Stra. 810. 1054. 1150. Cowp. 846. Doug. 561. Blandford v. De Tastet, 5 Taunt. 260. Horne v. Smith, 6 Taunt. 9. 1 Marshall, 410. S. C.
(2) Pearson v. Iles, Doug. 561.
(3) Ib. See ante, p. 2.
(4) 2 Stra. 1054.
(5) Ante, p. 2.
(6) By Wright J., in Ryder v. Fletcher, cited 13 East, 16. Huffe v. Fowke, Barnes, 33.
(7) Brodie v. Tichel, Barnes, 35. Stretch v. Wheeler, do. 497. Fuller v. Prentice, 1 H. Bl. 49. Blandford v. De Tastet, 5 Taunt. 260.

do, et redeundo. (1) And in ordinary cases, it is not necessary for the protection of a witness, that he should have been served with a subpœna, if upon application to him he consented to attend without one. (2) A reasonable time is allowed to the witness for going and returning; and in making this allowance the courts are disposed to be liberal. (3) This privilege has been extended to a party in the suit attending an arbitrator under an order of nisi prius. (4) So also a bankrupt, attending a meeting of commissioners in pursuance of a notice, is, during his attendance, protected from an arrest at the suit of a creditor (5), the commissioners being assembled under the authority of an act of parliament, and sitting as a court for the administration of justice. And by the mutiny act (6), witnesses are privileged from arrest during their necessary attendance on courts martial, in the same manner as witnesses attending a court of law.

Attendance before commissioners of bankrupt.

Commissioners of bankrupt, by stat. 1 J. 1. c. 15. s. 10., are empowered to issue their warrant, and apprehend persons, known or suspected of having any part of the bankrupt's property, or of being indebted to the bankrupt, who, after a sufficient warning given to them, refuse to come and appear before them to be examined, not having any lawful impediment for such refusal; and by sect. 11. of the same act, witnesses, sent for by the commissioners and attending, shall have such costs and charges as the commissioners shall think fit. It has been determined, that it is not necessary, under this section, to tender to a person, at the time of summoning him to appear before the commissioners, the expences of his journey; although, if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons. (7)

(1) Lightfoot v. Cameron, 2 Blac. Rep. 1113. Meekins v. Smith, 1 H. Bl. 636.

(2) Lord Kenyon C. J., in Arding v. Flower, 8 T. R. 536.

(3) 2 Blac. Rep 1113. Hatch v. Blisset, Gilb. Cas. 308., cited 2 Stra. 986. 13 East, 16. n. (*a*.) Willingham v. Matthews, 2 Marshall, 57.

(4) Spence v. Stuart, 3 East, 89.

(5) Arding v. Flower, 8 T. R. 534. 2 Blac. Rep. 1142. Kinder v. Williams, 4 T. R. 377. Spence v. Stuart, 3 East, 89. Ex parte Byne, 1 Ves. & Beam. 316.

(6) St. 55 G. 3. c. 108. s. 28.

(7) Battye v. Gresley, 8 East, 319. Ex parte Benson, 2 Rose, 75.

There is a material difference, in this respect, between a witness at law, and a person attending on the examination of commissioners; the necessity of a previous tender of expences, in the case of a witness who is subpœnaed to attend at a trial, arises from the special provision of the stat. 5 Eliz. c. 9. s. 12. Another difference is, that a person, attending the commissioners as witness under the statute of James, is not entitled to have his expences paid before the conclusion of his examination, when the amount of the compensation may be best ascertained. (1)

If a bankrupt is in execution, or cannot be brought before the commissioners, the acting commissioners are required by stat. 5 G. 2. c. 30. s. 6., to attend the bankrupt and take his discovery; but as this attendance on the bankrupt in prison has been found to be extremely inconvenient, it is now provided by stat. 49 G. 3. c. 121. s. 13., that bankrupts charged in execution are to be brought before the commissioners to be examined by them, in the same manner as bankrupts in custody on mesne process; and the warrant of the commissioners is an indemnity to the keeper of the prison.

Attendance before magistrates.

Magistrates have not, in general, any authority to compel the attendance of witnesses for the purpose of a summary trial, except under the special provision of acts of parliament. As the statute of 2 & 3 Ph. & Mary, c. 10. requires them to take the examination of persons, who bring a prisoner before them on suspicion of felony, it incidentally gives a power to examine them upon oath, and to summon by their warrant any other persons, who appear to be material witnesses for the prosecution, to come before them and give evidence. And it may be laid down as a general rule, that wherever magistrates are authorised by act of parliament to hear and determine, or to examine witnesses, they have incidentally a power to take the examination on oath. (2)

(1) Ex parte Roscoe, 1 Merivale, 188.

(2) See Dalt. Just. c. 6. Lamb. 517. And see stat. 15 G. 3. c. 39., which gives such power, for the purpose of levying penalties or making distresses.

Attendance on courts martial, and commissioners of inclosure.

Witnesses neglecting to attend on courts martial, after being duly summoned, are liable to be attached in the Court of King's Bench, &c., as if they had neglected to attend a trial in some criminal proceeding in that court. (1) And commissioners of inclosure, under the general inclosure act, stat. 41 G. 3. c. 109. s. 33, 34., have a power to summon in writing any person within a certain distance to appear before them and to be examined; and if the person summoned refuse to appear, he will be subject to a penalty.

Attendance in criminal cases.

The means of compelling the attendance of witnesses, in criminal cases, are of two kinds (2): first, by process of subpœna, for disobedience to which the person served with the process is liable to an attachment (3); or, secondly, the justice or coroner, who takes the information of the witnesses, may, at the time of taking it, or at any time before the trial, bind them over to appear; and, if they refuse to come or to be bound over, may commit them for a contempt. (2) This proceeding by recognizance is the ordinary and more effectual method.

In prosecutions for misdemeanors the defendant has been, from the earliest times, allowed the writ of subpœna. But prisoners had no right, by the common law, to this process in capital cases, without the special order of the court. (4) Formerly a prisoner was put upon his trial under a twofold disadvantage; he was unable to compel the attendance of witnesses, and if they voluntarily attended, their evidence, not being given on oath, met with less credit than the evidence on the part of the prosecution. But by stat. 7 W. 3. c. 3. s. 7., all persons indicted for any high treason, whereby corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear

(1) Stat. 55 G. 3. c. 108. s. 28.

(2) 2 Hale P.C. 281. Bennet v. Watson, 3 Maule & Sel. 1.

(3) R. v. Ring, 8 T.R. 585. The subpœna in this case issued from the Crown-office, requiring the witness to appear at the ensuing assizes in the country; and the Court of K. B. granted an attachment.

(4) 2 Hawk. P. C. c. 46. s. 17.

against them. And now, as the stat. 1 Ann. st. 1. c. 9. s. 3. enacts, that all witnesses, on behalf of a prisoner on a trial for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury, process may be taken out against them in any case whatever.

In order to provide for the appearance of witnesses, to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in any part of the United Kingdom, it is enacted by a late act of parliament, stat. 45 G. 3. c. 92. s. 3. and s. 4., that the service of a writ of subpœna or other process, in any one of the parts of the United Kingdom, shall be as effectual to compel his appearance in any other of the parts of the same, as if the process had been served in that part where the person is required to appear. And if the person served does not appear, the court, out of which the process issued, may transmit a certificate of the default in the manner specified by the act, and the court, to which the certificate is transmitted, may punish the person for his default, as if he had refused to appear to process issuing out of that court; provided it appear, that a reasonable and sufficient sum of money, to defray the expences of coming and attending to give evidence and of returning, was tendered to the person making default, at the time when the subpœna or other process was served upon him.

Compensation in criminal cases.

In civil proceedings, as we have seen, a witness is not obliged to attend or give evidence, unless his expences are duly tendered; but, in criminal prosecutions, witnesses are bound to appear unconditionally. On the other hand, it is reasonable and highly expedient, that, when they attend on behalf of the public, a fair compensation should be given them for their trouble and necessary expence. Formerly, however, the law provided no means for reimbursing them; a defect in our judicial administration, which was at length remedied by stat. 27 G. 2. c. 3. s. 3. This statute enacts, that "when any poor person shall appear on recognizance to give evidence against

another accused of grand or petit larceny or other felony, the court may, on the oath of such person, and on consideration of his circumstances, in open court order the treasurer of the county or place, in which the offence shall have been committed, to pay such sum of money, as to the court shall seem reasonable, for his time, trouble, and expence."

As this statute extended only to poor persons who appeared on recognizance, and not to such as appeared on subpœna to give evidence, it was afterwards deemed reasonable by the legislature, that every person so appearing on recognizance or subpœna, should be allowed his reasonable expences; and also, in case of poverty, a satisfaction for his trouble and loss of time. The stat. 18 G. 3. c. 19. s. 8. therefore enacts, that "where any person shall appear on recognizance or subpœna, to give evidence as to any grand or petit larceny or other felony, whether any bill or indictment be preferred or not to the grand jury, it shall be in the power of the court (provided the person shall, in the opinion of the court, have *bonâ fide* attended in obedience to such recognizance or subpœna,) to order the treasurer of the county or division, in which the offence shall have been committed, to pay him such sum as to the court shall seem reasonable, not exceeding the expences, which it shall appear to the court the said person was *bonâ fide* put unto by reason of the said recognizance and subpœna, making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time."

Another act, lately passed (1), provides, that in cases of felony, the court, before whom a person shall be prosecuted or tried, shall be empowered (at the request of any person bound to prosecute, or subpœnaed to give evidence, and who shall appear to prosecute or give evidence, or who shall appear to the court to have been active in the apprehension of a person accused of some one of the offences mentioned in several recited acts,) to order the sheriff or treasurer of the county, to

(1) St. 58 G. 3. c. 70. s. 4.

pay to the prosecutor and witnesses, and to the person concerned in such apprehension, as well the costs, charges, and expences, which the prosecutor shall be put to in preferring the indictment, as also such sum of money, as to the court shall seem reasonable and sufficient to reimburse them for their expences in attending before the grand jury to prefer the indictment, and in carrying on the prosecution, and also to compensate them for their loss of time and trouble in the apprehension and prosecution. And the 8th section further provides, that no person shall be entitled to any such costs or expences for attending the court, unless he shall have been bound by recognizance, or have previously received a subpœna to attend, or a written notice for that purpose from the prosecutor, his agent, or his attorney.

The statutes above referred to apply only to cases of felony; on prosecutions for misdemeanors, and in other cases not specially provided for by act of parliament, the court is not authorized to order a compensation to witnesses for their attendance. (1)

Tender of expences in criminal cases.

It has been doubted (2), whether a witness may not lawfully refuse to obey a subpœna on a criminal prosecution, as well as in a civil suit, unless he has a tender of his reasonable expences; and the doubt is suggested in consequence of a provision in the stat. 45 G. 3. c. 92., which (after enacting, that service of subpœna on a witness in any one of the parts of the United kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear,) provides, that he shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying his expences of coming, attending, and returning. One object, which the legislature had in view, was to provide for the appearance of witnesses in

(1) R. v. W. R. of Yorkshire, 7 T. R. 377.

(2) See Chitty's Treatise on Criminal Law, 1 vol. 612.

any of the parts of the United Kingdom, and they are therefore subject to punishment for non-attendance; on the other hand, as the expences of going from one of the parts of the United Kingdom to either of the other parts would necessarily be great, they were allowed to insist on the payment of their reasonable charges, previous to the journey; a provision more especially necessary at the time of passing this statute, when, in some parts of the kingdom, witnesses were not entitled to any compensation for attending to give evidence in criminal cases. (1) But as there is no statute respecting a tender of expences in the case of a criminal prosecution, except that mentioned above, (which is confined to the case, where the process is served in one of the parts of the United Kingdom for the appearance of the witness in another of the parts,) and as the tender of expences in civil suits is under the special provision of an act of parliament, the general rule in ordinary cases (whether of felony or misdemeanor) appears to be, that witnesses, making default on the trial of criminal prosecutions, are not exempted from attachment, on the ground that their expences were not tendered at the time of serving the subpœna, although the court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expences of the journey.

Lord Hale evidently so understood the general rule, when he mentions it as a defect in the law in his time, "that there is no power to allow witnesses their charges, whereby many times poor persons grow weary of attendance, or bear their own charges therein to their great hindrance and loss (2);" and Mr. Serjt. Hawkins, in his Pleas of the Crown, after mentioning the reimbursement of witnesses in civil proceedings, adds, "But in criminal proceedings, the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound unconditionally to attend

(1) In Ireland, the expences of witnesses in cases of felony were first allowed by st. 55 G. 3. c. 91.

(2) 2 Hale P. C. 282.

the trial, upon which they may be summoned and bound over to give their evidence." (1)

In addition to these authorities, a strong inference may be drawn from the preambles of stat. 27 G. 2. c. 3. s. 3. and stat. 18 G. 3. c. 19. s. 7., (which recite, that the expence of attending to give evidence operated as a discouragement to the poorer class of witnesses, and then provide for the repayment of the expences, to which they have been put by reason of the subpœna,) that, before these acts passed, witnesses were not in a situation to demand payment at the time of their being served with the process; for if they might have refused to obey the subpœna, unless a sufficient tender had been made in the first instance, they had a full and complete remedy in their own hands, and the remedy by act of parliament was unnecessary.

Independently of this reasoning, the extreme inconvenience, to which the contrary practice would necessarily lead — the unwillingness, which would often occur, to conduct a prosecution on the terms of paying expences, which might afterwards be only partially allowed — and the failure of prosecutions, which must continually happen, if witnesses were suffered to insist on a previous tender of their expences — these, and other considerations of the same kind, are sufficient to warrant the general rule as above stated. Criminal prosecutions are of public concern; a witness summoned to appear on a criminal trial has a public duty to perform; and he ought not to be at liberty to make a bargain for his appearance, as he may in the case of a civil suit, where only private interests are involved.

Habeas corpus ad testificandum.

A subpœna can have no effect, where the witness is in custody, or on board a ship under the command of an officer, who refuses to allow his attendance. The course then is to sue out

(1) 4 Hawk. b. 2. c. 46. s. 173.

a writ of *habeas corpus ad testificandum* (1); for which purpose application ought to be made to the court or a judge, upon affidavit of the party applying, stating that he is a material witness and willing to attend. (2) Upon this application the court in its discretion will make a rule, or the judge will grant his fiat for a writ (3), which is then sued out, signed, and sealed. (4) The writ should be left with the sheriff or other officer, who will then be bound to bring up the body, on being paid his reasonable charges. If the witness be a prisoner of war, he may be examined by consent or interrogatories, but cannot be brought up without an order from the secretary of state. (5)

It has been doubted whether persons in custody could be brought up as witnesses by writ of habeas corpus, to give evidence before any other courts except those at Westminster: but now by stat. 43 G. 3. c. 140. it is enacted, that a judge of either of the courts may, at his discretion, award such writ for bringing a prisoner, detained in any gaol in England, before a court martial, or before commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant; and the stat. 44 G. 3. c. 102. authorizes the judges of the court of King's Bench, or Common Pleas, or Exchequer, in England or Ireland, or justices of oyer and terminer or gaol delivery (being such judge or baron), to award writs of *habeas corpus* for bringing prisoners detained in gaol before any of the courts, or any sitting at *nisi prius*, or before any court of record in those parts of the United Kingdom, to be there examined as witnesses in any civil or criminal cause; and by the same act, justices of great sessions in Wales and the county

(1) Tidd. Pr. 850. Ex parte Tillotson, 1 Stark. N. P. C. 470. See form of affidavit in Tidd's App. c. 33. s. 37. p. 332.

(2) R. v. Roddam, Cowp. 672. On the trial of Sir John Freind for high treason, Lord C. J. Holt, on the application of the prisoner, ordered his clerk to prepare a warrant for a *habeas corpus*. 4 St. Tr. 600. And see Layer's case, Fortesc. 396.

(3) R. v. Burbage, 3 Burr. 1440.

(4) Tidd. Pr. 850.

(5) Furly v. Newnham, 2 Doug. 419.

palatine of Chester have the same authority within the limits of their jurisdiction. The application for a writ of habeas corpus under this statute ought to be made to a judge out of Court. (1)

Examination on interrogatories.

When a material witness resides abroad, or is going abroad, and cannot attend at the trial, the party requiring his testimony may move the court in term-time, or may apply to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse* before one of the judges of the court, if the witness reside in town, or, if he reside in the country or abroad, before commissioners specially appointed and approved by both parties. (2) The rule or order for such examination cannot be obtained without the consent of both parties, as the depositions are only secondary evidence. Without this consent, therefore, the Court will not give the plaintiff leave to examine upon interrogatories an attesting witness to a deed, or to give the examination in evidence at the trial, on the ground that the witness is incapacitated by illness from attending, and unlikely ever to be able to attend, though it appear by affidavit, that the defendant had at one time admitted the execution of the deed; nor will the court, on these grounds, grant a rule for dispensing with the attendance of the witness. (3) And though the court will not compel the other party to consent, yet, if necessary, it will assist the party applying by putting off the trial, (that there may be an opportunity of filing a bill in equity,) until the consent is obtained, or the witness returns; and if, after all, the defendant should refuse, the court will not give him judgment as in case of a nonsuit. (4)

When a party, after obtaining leave by consent, examines witnesses abroad on depositions, he will not be entitled to any allowance, in the taxation of costs, for the expence of taking

(1) Gordon's case, 2 Maule & Selw. 582.

(2) 2 Tidd. Pr. 852.

(3) Jones v. Brewer, 4 Taunt. 47.

(4) Furly v. Newnham, 2 Doug. 419. Mostyn v. Fabrigas, Cowp. 174. Calliard v. Vaughan, 1 Bos. & Pull. 211. As to the admissibility of depositions on interrogatories, see 2d part, c. 4. s. 2.

the depositions, although he may proceed in the action. (1) The same rule prevails in the court of Chancery: if a party applies to that court for a commission to examine witnesses, he must pay the expences.

Witness in India.

Where a cause of action has arisen in India, or any offence has been committed there, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by stat. 13 G. 3. c. 63. ss. 40. 44.

Putting off trial for absence of witness.

If the defendant is unable to proceed to trial, on account of the absence of a material witness, he may move the court in term-time, or apply to a judge in vacation, on an affidavit of the facts, to put it off till the next term; or in the Common Pleas, if necessary, to a more distant period. (2)

An application to put off a trial beyond the existing sittings, or from sittings to sittings, is not allowed on the part of the plaintiff; for he has the power at any time of withdrawing the record, if he is not prepared to try the cause. But where, from the sudden indisposition of a witness, who may be able to attend in the course of a day or two, or for any other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe that he shall be able to try before the sittings are over, it would be too much to make him in such a case withdraw his record; and a judge at nisi prius will therefore make an order for the trial to stand over, till the witness is likely to attend. (3) It is a rule in the court of Common Pleas, that the trial of a cause can never be put off on the consent of the parties and counsel, at the sittings at *nisi prius*, but the plaintiff must either proceed to try or withdraw his record. (4)

(1) Stephens v. Crichton, 2 East, 259. Taylor v. Roy. Ex. Ass. Comp. 8 East, 393.

(2) Pr. Reg 398. Tidd. Pr. 826. See form of affidavit in Tidd. App. 312.

(3) Ansley v. Birch, 3 Campb. 333. by Lord Ellenborough.

(4) 2 Taunt. 221.

Before the court will consent to put off the trial on account of the absence of a material witness, it requires to be satisfied, that injustice would be done by refusing the application, and that the party, who makes the application, has not conducted himself unfairly, nor been the cause of any improper delay. (1) The rule will not be granted to the defendant, after he has pleaded a sham plea, by which a trial has been lost, unless he consent to pay the money into court (2); nor where the testimony of the absent witness is intended to set up an odious defence, (as, that the plaintiff is slave to the defendant, and therefore could not recover in the action, or that he is an alien enemy, &c.) (3); nor will it grant the rule for the purpose of giving the defendant an opportunity, which he has once lost by his own neglect, of applying to a court of equity for a commission. (4)

When a motion is about to be made to a judge at *nisi prius*, for putting off the trial of a cause on account of the absence of a witness, notice should first be given to the plaintiff's attorney, with a copy of the intended affidavit. This affidavit ought regularly to be made by the defendant himself; but if he is abroad or out of the way, it may be made by his attorney or a third person. (5) The affidavit generally states, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured without effect to get him subpœnaed; but that he is in hopes of procuring his future attendance. (6)

Subpœna duces tecum.

If a witness has in his possession any deeds or writings, which are thought necessary at the trial, a special clause must be inserted in the subpœna, called a *duces tecum*, commanding him to bring them with him. When the writings are in possession of the adverse party or his attorney, notice

(1) Saunders v. Pitman, 1 Bos. & Pul. 33.
(2) Tidd. Pr. 827.
(3) Robinson v. Smyth, 1 Bos. & Pull. 454
(4) Calliard v. Vaughan, 1 Bos. & Pull. 212.
(5) Peake, N. P. C. 97.
(5) See form of affidavit, Tidd. Pr. Appx. 312.

should be given to produce them; and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents will be admitted. It is not necessary to give notice to the defendant himself; giving it to his attorney will be sufficient even in penal actions. (1)

This writ of subpœna *duces tecum*, as well as the other writ of subpœna *ad testificandum*, is compulsory upon the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required, in obedience to the judicial mandate. (2) From the earliest times, our courts of common law, in order to give effect to their proceedings, have resorted to these compulsory measures for the production of evidence; measures obviously essential to the existence and constitution of courts of justice.

CHAP. II.

Of the Incompetency of Witnesses from Want of Understanding.

Credibility—incompetency.

WHEN a witness appears, he must be regularly sworn unless an objection is made to his competency; and the course of proceeding is, that the party, who objects to the witness, should state all his objections at the same time, in order to prevent unnecessary delay. (3) An exception to the credibility of a witness cannot exclude him from being sworn. The exception of kindred, for example, although it is a good cause of challenge against a juror, is not an objection to the competency of a witness; a father is a competent witness for or against his son, and a master for his servant, or a servant for his master. Such exceptions may affect the credibility, but they do not affect the competency of witnesses.

(1) Attorney-General v. Le Merchant, 2 T. R. 207. n. Cates q. t. v. Winter, 3 T. R. 306. See form of writ, Tidd. Appx. 372.

(2) Amey v. Long, 9 East, 485.

(3) Lord Lovat's case. 9 St. Tr. 652.

As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine, whether a witness is competent, or the evidence admissible. Whether there is *any* evidence, is a question for the judge: whether it is *sufficient*, is for the jury. (1) And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency or admissibility of evidence, as, for example, whether a child understands the nature of an oath — or whether the confession of a prisoner was voluntary — or whether declarations, offered in evidence as dying declarations, were made under the immediate apprehension of death — these, and other facts of the same kind, are to be determined by the court, and not by the jury.

Causes of incompetency.

By the law of England the objections to the competency of witnesses are fourfold. The first ground of incompetency is want of reason or understanding: a second ground is defect of religious principle: a third ground arises from conviction of certain crimes, or from infamy of character: the fourth and most general cause of incompetency is interest. Either of these grounds of incompetency will exclude the witness from giving any kind of evidence. "I find no rule less comprehensive than this," said Mr. Justice Lawrence in the case of Jordaine v. Lashbrooke (2), "that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest."

An inquiry into these several causes of incompetency forms the subject of the four following chapters.

First, as to incompetency for want of understanding.

Want of understanding.

Persons, who have not the use of reason, labour under a

(1) By Buller J. Comp. of Carpenters, &c. v. Hayward, Doug. 375. Bull. N. P. 297.

(2) 7 T. R. 610.

physical disqualification, and from their infirmity are utterly incapable of giving evidence. Insane persons, idiots, and lunatics under the influence of their malady, are in this situation. (1) But lunatics, and other persons, though subject to temporary fits of insanity, may yet be witnesses in their lucid intervals, if they have sufficiently recovered their understandings. (2) And a person born deaf and dumb is not on that account incompetent, but, if he has sufficient understanding, may give evidence by signs with the assistance of an interpreter. (3)

Children.

A witness must not only have a competent share of reason, but also know the nature of an oath. Children, therefore, not able to understand its moral obligation, cannot be examined. (4) There seems to be no precise age fixed, at which infants are excluded from being witnesses. At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that none could be admitted under the age of nine years, very few under ten (5); which was in some measure denying them the protection of law against secret acts of violence. (6.) A more reasonable rule has been since adopted; and the admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. In Brazier's case, on an indictment for assaulting an infant of five years of age with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil: but that they cannot be examined, in any case, without oath. (7) This is now the established rule in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or for one of an inferior nature. When the child has appeared not sufficiently to understand

(1) Co. Lit. 6. *b*. 6 Com. Dig. tit. "Testmoigne," A. 1.

(2) Com. Dig. Ib.

(3) Ruston's case, 1 Leach, Cr. C. 455.

(4) Com. Dig. Ib. Bull. N. P. 293. Gilb. Ev. 130.

(5) R. v. Travers, 2 Stra. 700.; and cases in East, P.C. 442. S.P. 1 Hal. P.C. 302. 2 Hal. P.C. 278.

(6) Bull. N.P. 293.

(7) Brazier's case, 1779, 1 East, P. C. 443, 4. Bull. N. P. 293. 1 Leach, Cr. C. 237. 4 Blac. Com. 214.

the nature and obligation of an oath, judges have often thought it necessary for the purposes of justice, to put off the trial of the prisoner, directing that the child in the mean time should be properly instructed.

If a child is too young to be sworn, it follows as a necessary consequence, that any account, which it may have given to others, ought not to be admitted. On an indictment, therefore, for a rape on a child five years old, where the child was not examined, but an account of what she had told her mother, about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally, as was supposed, on that evidence: the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned. (1)

Account without oath.

When the evidence of children is admitted, says Mr. Justice Blackstone (2), it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. It seems, however, impossible to lay down any general rule on this subject, applicable to all cases. A prisoner may be legally convicted on such evidence, alone, and unsupported; and whether the account of the witness requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the child has given his evidence. The evidence may be so circumstantial, so plain and clear, and so free from all mixture of partiality and ill will, as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses.

Confirmatory evidence.

(1) R. v. Tucker, 1808, MS. See also R v. Brazier, supra.

(2) 4 Com. 214.

CHAP. III.

Of Incompetency from Defect of Religious Principle.

THE second ground of incompetency, which has been mentioned, is defect of religious principle.

Principle of the rule.

All witnesses, before they are examined, are required to take an oath, by which they appeal to the Supreme Being for the truth of the evidence which they are about to give. This necessarily implies a belief, that by the laws of God truth is enjoined, and falsehood punished. It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character or to the common interests of society, or from fear of punishment. (1) Such motives have indeed their influence, and may come in aid of the religious obligation, but they are of a nature so capricious and infirm, and so liable to be perverted, as to afford little or no security for the observance of truth. Our law therefore, like that of most other civilised countries, requires a witness to believe, that there is a God and a future state of reward and punishment, and that by taking the oath he imprecates the divine vengeance upon himself, if his evidence shall be false. (2)

Atheists—infidels.

Atheists, and such infidels as profess not any religion, that can bind their consciences to speak the truth, are excluded from being witnesses. (3) Lord Coke, indeed, says generally, that an infidel cannot be a witness (4), in which denomination he intended to comprise Jews as well as Heathens (5): and Mr. Serjeant Hawkins thought it a sufficient objection to the competency of a witness, that he believed neither the Old nor the New Testament. (6) Lord Hale however was of a different

(1) Ruston's case, 1 Leach, Cr. C. 455.
(2) White's case, 1 Leach, Cr. C. 482. 1 Atk. 19. 48.
(3) Bull. N. P. 292. 1 Atk. 40, 45. 48. Gilb. Ev. 129.
(4) 4 Co. Lit. 6. *b.*
(5) 2 Inst. 506. 3 Inst. 165. 1 Atk. 43. Willes, 541.
(6) Hawk. P. C. b. 2. c. 46. s. 148.

opinion, and strongly points out the unreasonableness of excluding indiscriminately all Heathens from giving evidence, as well as the inconsistency of compelling them to swear in a form, which they may possibly not consider binding. "It were a very hard case, he says, if a murder, committed here in presence only of a Turk or a Jew, should be dispunishable, because such an oath should not be taken, which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the courts of England." (1) All doubts upon this subject, however, are now removed. In the celebrated case of Omichund and Barker, (which came before Lord Chancellor Hardwicke, assisted by Lee C. J., Willes C. J., and Parker C. B.) it was solemnly decided, that the depositions of witnesses professing the Gentoo religion, who had been sworn according to the ceremonies of their religion under a commission out of Chancery, ought to be admitted in evidence. (2) And it may now be considered as an established rule, that infidels of any other country, who believe in a God, the avenger of falsehood, ought to be received here as witnesses; but infidels, who believe not that there is a God, or a future state of rewards and punishments, cannot be admitted in any case. (3)

The proper mode of examining a witness, for the purpose of trying his competency on this ground, is not to question him as to his particular opinions, (as, whether he believes in Jesus Christ,) but to enquire whether he believes in the existence of a God and a future state. In a case before Mr. Justice Buller, where a witness, who had been sworn on the Gospels, was asked, whether he believed in the Gospels on which he had been sworn, the question was objected to, and is said to have been overruled by the court. (4) This question appears to have been put after the swearing in chief, though before the examination of the witness. If it had been asked before the witness was sworn, it seems that it would have been regular;

Examination as to opinions.

(1) 2 Hale P. C. 279.
(2) Omichund and Barker, 1 Atk. 21. 1 Wils. 84. S. C. Willes, 538. S. C.
(3) Willes, 549. 1 Atk. 45. Fachina v. Sabine, Stra. 1104. Morgan's case, Leach, Cr. C. 64.
(4) R. v. Taylor, Peake N. P. C. 11.

for if he had not believed in the Gospels, how could he have been effectually sworn upon them? The administration of an oath in such a case would be entirely nugatory; and evidence would be given without any religious sanction, on the bare assertion of a witness. If the law requires an oath, to be administered in a certain form, and a witness believes not in any form of religion, the consequence must necessarily be, that he cannot be sworn. (1)

Excommunication.

It has been frequently laid down, that persons excommunicated are not competent witnesses, because it is supposed, that those who have been excluded from the church, are not under the influence of any religion. The authority, generally referred to in support of this rule, is a dictum of Lord C. J. Coke, in the case of the Attorney General v. Griffith (2), concerning the oath of allegiance required of Popish recusants. He is there reported to have said, "By the stat. 3 J. 1. c. 5. every recusant convict is to be excommunicated; and therefore on my circuit I do not admit of them for witnesses between party and party, they being not competent witnesses." On the authority of this dictum, the rule has been commonly adopted by writers on the subject of evidence; although the reason, upon which it is supposed to have been founded, would in the present day be generally exploded. But now, by a late act of the legislature, this objection has been entirely removed. The stat. 53 G. 3. c. 127. s. 2, 3. enacts, that no sentence of excommunication shall be pronounced by ecclesiastical courts in cases of contempt or disobedience to their order, and that persons excommunicated shall in no case incur any civil penalty or disability.

Form of swearing.

With regard to the ceremony or form of administering an oath, that form is obviously the best, which most clearly conveys the meaning of the oath, and most forcibly impresses its obligation. And since this is not an essential part of the oath, but entirely of human institution, and has varied in different

(1) A Tract has been written on this subject by Mr. Baron Smith, one of the Barons of the Court of Exchequer in Ireland.

(2) 2 Bulstr. 155.

times and countries, though the substance of the oath must be the same in all, it is obviously necessary to allow men to swear according to the peculiar ceremony of their religion, that is, in the manner which they consider most binding on their conscience. "Possibly," says Lord Hale, "they may not think themselves under any obligation, if sworn according to the usual style in the courts of England." (1) Jews have therefore been sworn in our courts, from the earliest times, on the Pentateuch (2); and no distinction appears ever to have been taken between their swearing in a civil or in a criminal case. In an old case, where a witness refused to be sworn in the usual form, by laying his right hand on the book and kissing it afterwards, Glin C. J. ruled, that he might be sworn, by having the book laid open before him and holding up his right hand. (3) "In my opinion," said the Chief Justice, "he has taken as strong an oath as any other witness." On the trial of some of the rebels at Carlisle in the year 1745, a witness being sworn in the same manner by holding up his hand, the point was referred to the judges for their opinion, and they all agreed in thinking the witness legally sworn. (4) There is at this day a sect in Scotland, who hold it to be idolatry to kiss the book; but their own form of swearing is much more solemn. (5) Common sense requires, that witnesses should be allowed to swear in that particular form, which they think most binding. A Quaker *affirms* the truth of what he states. A Jew swears on the Pentateuch, with his head covered. A Gentoo touches with his hand the foot of a Bramin. Mahometans are sworn on the Koran (6): and upon the same principle, all persons ought to be sworn according to the ceremonies of their peculiar religion. (7) Whatever be the form, the meaning of the oath is the same. It is an appeal to Heaven, calling upon God to witness what we say, and invoking his vengeance, if what we say be false.

(1) 2 H. P. C. 279. 1 Atk. 42. 48.

(2) 1 Atk. 40. 42. Willes, 543. Cowp. 389.

(3) Dutton v. Colt, 2 Sid. 6.

(4) By Gold J. in Mildrone's case, 1 Leach Cr. C. 459. Mee v. Reed, Peake N. P. C. 22. S. P.

(5) Lord Mansfield, Cowp. 390.

(6) Morgan's case, 1 Leach Cr. C. 64. by Gold J. delivering the opinion of all the judges. Cowp. 390. Fachina v. Sabine, 2 Stra. 1104.

(7) Omichund and Barker, 1 Atk. 21.

Quakers.

There appears to be no good reason for not admitting the solemn affirmation of a Quaker in all cases, as well as the oath of a Jew or Gentoo, or any other person, who thinks himself really bound by the mode and form in which he attests. Before the Revolution, Quakers, who refused to take a legal oath, were treated as obstinate offenders, and subject to penalties (1). But these hardships were removed by the toleration act (2), which first allowed them to make a declaration of their fidelity to the state instead of taking an oath of allegiance, and exempted them from all pains and penalties on their making, if required, certain other declarations there prescribed. And by another statute, which passed about six years after (3), their solemn affirmation in courts of justice is admitted to have the same effect as an oath taken in the usual form, excepting only that on such affirmation they are not permitted to give evidence in criminal cases. This exception against the testimony of Quakers in criminal prosecutions (which Lord Mansfield has called a strong prejudice in the minds of the great men who introduced the statute (4), has been continued in the several succeeding acts of the legislature on this subject (5). The soundness and propriety of such a distinction between criminal and civil cases may well be questioned; unless it can be shown, that evidence requires less sanction in civil cases than in criminal, or that Quakers, in making their solemn affirmation, do not consider themselves under a strict religious obligation to speak the truth. The affirmation of a Quaker, as Lord Mansfield observed in his excellent judgment in the case of Atcheson against Everett (6), is in substance the same as an oath; the form only is different; an affirmation is a most solemn appeal and attestation to God.

The legislature, by not admitting the affirmation of Quakers in criminal cases, must be understood to mean causes technically criminal (7). They may be received in penal actions; as,

(1) St. 13 C. 2. c. 1.
(2) St. 1 W. & M. c. 18. s. 13.
(3) St. 7 & 8 W. 3. c. 34.
(4) Cowp. 390.
(5) St. 8 G. 1. c. 6. St. 22 G. 2. c. 46. s. 36.
(6) Cowp. 382.
(7) Cowp. 391.

in an action for debt on the statute against bribery in elections (1): so, on a motion for an attachment for non-performance of an award (2), or on a motion to quash an appointment of overseers (3); these proceedings being of a civil, not a criminal nature. But in all cases, which are substantially of a criminal nature, the affirmation of a Quaker is inadmissible: as, in an appeal for murder (4), though it is in form a civil proceeding; so on a motion for an information for a misdemeanor (5), or on exhibiting articles of the peace (6), or on a motion for non-performance of an order of Court. (7) Where the application to the court is *against* a Quaker, his affirmation may be received in his own defence, though the proceeding be of a criminal nature. (8)

It has been observed by Lord Mansfield (9), that Quakers are at present under some hardship, in not being able to call other Quakers as witnesses in their defence, on a charge of treason or felony; since in these cases, witnesses on behalf of the prisoner are to be sworn, before they can give evidence, like witnesses for the crown (10); and no exception is made in the statute, in order to give a prisoner the benefit of a Quaker's testimony.

CHAP. IV.

Of Incompetency from Infamy.

A THIRD cause of incompetency is infamy of character, proceeding from a conviction of some offence.

(1) Atcheson v. Everett, Cowp. 382.
(2) Taylor v. Scott, cited Cowp. 394. Powel v. Ward, cited Andr. 200.
(3) R. v. Turner, 2 Str. 1219.
(4) Castile v. Bainbridge, 2 Str. 856. Cowp. 392.
(5) R. v. Wych, 2 Str. 872. R. v. Gardner, 2 Burr. 1117.
(6) R. v. Green, 1 Str. 527.
(7) Skipp v. Harwood, Willes, 291; and see n. (*b*) ib., where the cases on this subject are collected.
(8) R. v. Shacklington, Andr. 201. n. R. v. Gardner, 2 Burr. 1117. Cowp. 383. 392.
(9) Cowp. 391.
(10) St. 7 & 8 W. & M. c. 3. s. 1. 1 Ann. st. 2. c. 9. s. 3.

The conviction of an infamous crime, followed by judgment, disqualifies a witness from giving evidence in courts of justice. This is strictly a legal objection, to be supported by strict legal proof; and nothing less than a conviction will disqualify. Here again is another striking instance, to show the distinction between competency and credibility. Witnesses of the most infamous and depraved character, though not credible; may yet be competent; and it frequently happens, that a witness is suffered to give evidence, because not absolutely disqualified by the rules of law, though at the same time he may be far worse, in point of credit and real character, than another, who is at once excluded as incompetent. Writers on the subject of evidence, therefore, distinguish between the *infamia juris* and the *infamia facti.* Of these tests of infamy, the latter may destroy the credibility of a witness; but it is the former only, that can destroy his competency.

In treating of this subject, it is proposed to consider, in the first section, what offences incapacitate, and how a witness may be restored to his competency; in the second, to consider the evidence of accomplices.

Sect. I.

What Offences incapacitate; and of the Mode of restoring Competency.

What crimes disqualify.

1. There are many offences, which our law considers such blemishes on the moral character, as to incapacitate from giving evidence in courts of justice. (1) Of this kind are treason, and every species of the *crimen falsi,* such as forgery, perjury, subornation of perjury, attaint of false verdict (2), and other offences of the same description, which involve the charge of falsehood, and affect the public administration of justice. (3)

(1) Gilb. Ev. 126. Bull. N. P. 291.

(2) Co. Lit. 6. *b.* Hawk. b. 2. c. 46. s. 101. Com. Dig. Testmoigne, A. 5. 2 H. P. C. 277. Fortesc. Rep. 209. Jones v. Mason, 2 Stra. 833. Walker v. Kearney, 2 Stra. 1148.

(3) See the judgment of Sir W. Scott in the case of Ville de Varsovie and others, May 13. 1817.

The whole class of offences which come under the denomination of felony (1), that is, all offences which occasion a forfeiture of lands or goods, will have the same effect in rendering a witness incompetent; though it is obvious, that crimes are not always punished by the legislature in proportion to their guilt, and there may be more depravity in frauds, which are not punishable, than in some kinds of felony. By the common law, a person convicted of petty larceny was not a competent witness, as the offence was felony no less than grand larceny (2); but now by stat. 31 G. 3. c. 35. it is enacted, that no person shall be incompetent by reason of a conviction for petty larceny.

Some other offences also make a witness incompetent after conviction and judgment; as præmunire, barretry (3), or bribing a witness to absent himself and not give evidence. (4) And a witness is disqualified by attaint of conspiracy at the suit of the king (5), that is, of a conspiracy to accuse another person of a capital offence (6); for then he is to have the villainous judgment, and lose the freedom of the law. It is otherwise, says Lord Hale, where he is attainted of a conspiracy at the suit of the party (7); and in a late case in the Admiralty court, which underwent much discussion, Sir W. Scott determined on great consideration, that a conviction for a conspiracy to commit a fraud would not render an affidavit of the convict inadmissible. (8) So, it should seem, a person, who has been convicted of winning by fraud or ill practice in certain games, would not be a competent witness, since the stat. 9 Ann. c. 14, s. 5. not only inflicts a penalty, but also enacts, that he shall be deemed infamous; and one of the legal

(1) Co. Lit. 6. *b*. Com. Dig. ubi sup.

(2) 2 H. P. C. 277. Pendock v. Mackinder, Willes, 667; where the authorities on this point are collected.

(3) R. v. Ford, 2 Salk. 690. Bull. N. P. 292. See Com. Dig. tit. Testmoigne, A. 5.

(4) Adjudged in Clancey's case, by seven judges; Holt C. J. doubting at first. Fortesc. Rep. 208.

(5) Co. Lit. 6. *b*. 2 H. P. C. 277. Hawk. P. C. b. 1. c. 72. s. 9. Com. Dig. ubi sup.

(6) 2 H. P. C. 277. Hawk. ib. See R. v. Crossley, 2 Leach, Cr. C. 496.

(7) 2 H. P. C. 277. Saville v. Roberts, Carth. 416. Hawk. ubi sup.

(8) In the case of Ville de Varsovie and others, May 13. 1817.

legal consequences of infamy is incompetency to give evidence in a court of justice. (1) As convicts in such offences cannot be witnesses, they cannot make affidavits to support a charge against others; but, to exculpate or defend themselves, their affidavits have been allowed (2); and upon the same principle the affirmations of Quakers are admitted in their defence on a criminal charge.

Outlawry.

Outlawry in a personal action is no ground of exception. (3) But judgment of outlawry for treason or felony, appearing on record by the sheriff's return of the exigent, has the same effect as judgment after a verdict or confession (4); it follows, therefore, that such an outlaw cannot be a competent witness. (5)

Punishment.

Some kinds of punishment were formerly thought to be marks of infamy, and therefore witnesses were frequently rejected after standing in the pillory, or after branding; these being the usual punishments for the *crimen falsi.* (6) But the distinction is obvious, and now clearly settled, that it is not the punishment, but the nature of the offence, which causes infamy. (7) The maxim is, ex delicto non ex supplicio emergit infamia. Thus, it is no objection against the competency of a witness, that he has been in the pillory for a libel on the government, or for a trespass, or a riot. (8) He is not incompetent, unless he has suffered for the *crimen falsi*, as, for perjury, &c; in which case, it is the crime, not the punishment, that incapacitates. And, on the other hand, after judgment for the latter kind of

(1) Co. Lit. 6. *b.* Fortesc. 208.

(2) Davis and Carter's case, 2 Salk. 461. Charlesworth's case, cited by the Court in Walker v. Kearney, 2 Str. 1148.

(3) Co. Lit. 6. *b.* Com. Dig. Testm. A. 5. Hawk. P. C. b. 1. c. 72. s. 107.

(4) 3 Inst 212. Hawk. P. C. b. 2. c. 48. s. 22.

(5) Celier's case, Sir T. Raym. 369.

(6) 2 H. P. C. 277. Co. Lit. 6. *b.*

(7) Gilb. Ev. 127. Bull. N. P. 292. R. v. Davis, 5 Mod. 75. R. v. Ford, 2 Salk. 690. Pendock v. Mackinder, 2 Wils. 18. Willes, 666. S. C. Fortesc. 209. Priddle's case, 2 Leach, Cr. C. 496.

(8) Chater v. Hawkins, 3 Lev. 426. Com. Dig. Testm. A. 5. Gilb. Ev. 127. Fortesc. Rep. 209. In such cases, punishment by the pillory is now abolished. See st. 56 G. 3. c. 138. But this statute does not make any alteration in the punishment of perjury, or of subornation of perjury.

offence, he is not competent, though the punishment may have been only a fine. (1)

Infamy, arising from the sentence of a court of justice, must be established by regular proof of a conviction and judgment in the due course of law. The rule most commonly laid down is, that a *conviction* makes the witness incompetent. But it is not to be understood, that conviction alone incapacitates; the conviction may possibly have been quashed, on a motion in arrest of judgment. (2) The judgment, therefore, as well as the conviction, must be proved; and the general rule is, that the judgment can only be proved by the record or by a copy of the record. (3) Even an admission by the witness himself, of his being in prison under judgment for grand larceny (4), or of his having been guilty of perjury on another occasion (5), will not make him incompetent, however it may affect his credit. Proof of judgment.

If the objection to the competency of a witness is founded on criminal proceedings instituted in a foreign court, these proceedings must appear on their face to be regular, and be regularly proved. A document, purporting to be an indictment and conviction, is imperfect as a record, without a caption; since the caption shows, by what authority the indictment was found. (6) And the indictment must state all circumstances essential to constitute the offence. (6)

A person convicted of felony being thus disabled from giving evidence, it remains to be considered, by what means the disability may be removed. Competency how restored.

1. In ancient times, this was effected in many cases by a proceeding then in use, called purgation (7), by which all persons, 1. Purgation.

(1) R. v. Ford, 2 Salk. 690. Bull. N.P. 292. Crosby's case, 10 St. Tr. 42. Appx.
(2) Lee v. Gansel, Cowp. 8. Gilb. Ev. 129. Com. Dig. tit. Testm. A. 5. Sutton v. Bishop, 4 Burr. 2283.
(3) Com. Dig. Ib. 8 East, 79.
(4) R. v. Castel Careinion, 8 East, 78.
(5) R. v. Teale, 11 East, 309.
(6) Cooke v. Maxwell, 2 Starkie, N. P. C. 184.
(7) Treby C. J. in Lord Warwick's case, 5 St. Tr 172. Hob. 288. Kelyng, 37.

entitled to the benefit of clergy, were allowed to clear themselves before the ordinary, even after a conviction in the temporal courts. If on this canonical trial the party failed, which seldom happened, he was sentenced to remain in the ordinary's prison; and, on the other hand, upon his acquittal, he was pronounced innocent, absolved from infamy, and discharged from the punishment, incapacity, and discredit incident to the felony. Thus, formerly, allowance of the privilege of clergy, followed by purgation, would restore the competency of a witness.

2. Benefit of clergy.

2. It was afterwards found necessary to abolish this mode of trial by purgation; and therefore the stat. 18 Eliz. c. 7. s. 3. enacted, that persons, admitted to the benefit of clergy, should no longer be delivered to the ordinary for purgation; but, "after the clergy allowed and burning in the hand, should forthwith be enlarged and delivered out of prison." In the construction of this statute, the judges held, that, as the old mode of purgation was thus taken away, the burning in the hand should be considered, as having the same effect in clearing away the disabilities of conviction. (1) "It was never the intent of the statute," said Lord Chief Justice Treby, in Lord Warwick's case, "merely to set at large and leave him a convict-felon; but when it said 'delivered,' it meant delivered free from all incident and further penalties, as if delivered upon purgation." (2) Hence the burning in the hand is considered in the nature of a statute-pardon. (3)

3. Substituted punishment.

3. In cases where, instead of this burning in the hand, some other punishment has been substituted by act of parliament, (as transportation, by st. 4 G. 1. c. 11. (4), or a fine or whipping

(1) Heston's case, cited in Foxley's case, 5 Rep. 110. Searle v. Williams, Hob. Rep. 292. Celier's case, Sir T. Raym. 369. Lord Castlemain's case, ib. 380. Kelyng, 37.

(2) Ld. Warwick's case, 5 St. Tr. 172.

(3) Hob. 292. Bull. N. P. 292.

(4) This statute enacts, that on the conviction of any person for grand or petit larceny, where the convict is entitled to benefit of clergy, and liable only to the penalties of burning in the hand or whipping, (expect persons convicted for receiving or buying stolen goods, knowing them to be stolen,) the Court before whom the person is convicted, instead of ordering the offender to be burnt in the hand or whipped, may direct, that he

by st. 19 G. 3. c. 74. s. 3.) felons, within the benefit of clergy, are made competent after suffering such substituted punishment: these statutes expressly providing, that it shall operate as a pardon, and completely remove all incapacities. And it appears from the recital of st. 31 G. 3. c. 35. the statute before-mentioned, which removes the incompetency arising from a conviction for petty larceny (1), that in every case of grand larceny, convicts are restored to their competency by suffering the punishment awarded by the judgment; that statute reciting, that persons convicted of grand larceny are by their punishment restored to their credit as witnesses. Peers of parliament (2), and all clergymen are entitled to benefit of clergy, and are therefore competent witnesses, without burning in the hand, and consequently without any punishment in its stead.

Proof of benefit of clergy.

It appears to be established by several cases, that proof of the record, whereby clergy is granted, without further proof of the burning in the hand, is not sufficient (3): for the words of the statute are, that he shall be "delivered after clergy allowed and burning in the hand." This, therefore, is necessary to be proved, except in those cases where the benefit of clergy may be allowed without branding, as to a clerk in holy orders or peer of parliament, or where the branding is excused by pardon, or changed for another punishment (as a fine), and then it must be shown, that the witness has suffered such substituted punishment instead of the other. (4) In Lord Warwick's case, above cited, one who had been convicted of manslaughter and allowed his clergy, but not burnt in the hand, was called as witness for the prisoner: and, on

shall be transported for the space of seven years; and on the conviction of an offender for a crime, for which he would be excluded from the benefit of clergy, but to whom mercy is extended on condition of transportation, the Court may allow him the benefit of a pardon under the great seal. And, by the second clause of the same act, where any such offenders shall be transported, and shall have served their respective terms, according to the order of any such Court, such services shall to all intents and purposes have the effect of a pardon, as for the crime for which they were so transported.

(1) This act was proposed by Lord Kenyon. See Evans's Coll. Stat. vol. 5. part 4. 360.

(2) St. 1 Ed. 6. c. 12. s. 4.

(3) Searle v. Williams, Hob. 288. Armstrong and Lisle, Kel. 93. Ld. Warwick's case, 5 St. Tr. 166.

(4) Burridge's case, 3 P. Wms. 485. 490.

an objection to his competency, the lords referred it to the judges present, who thought he was not a competent witness, as the statute had made the burning in the hand a condition precedent to the discharge. (1)

Petty larceny.

As the privilege of clergy, at common law, extended only to capital felonies, and not to petty larcenies or misdemeanors, persons convicted of petty larceny could not be discharged under stat. 18 Eliz. c. 7. s. 3., which relates only to such as were allowed their clergy; nor were they included in stat. 19 G. 3. c. 74. s. 3., which gives a discretionary power to substitute a moderate fine or whipping for burning in the hand (2); so that convicts in petty larceny, though they had suffered the sentence of the law, were still incompetent to give evidence, while in many cases convicts in grand larceny were admissible. This inconsistency was removed by a statute of the present reign, which has been already mentioned. (3)

Reversal of judgment.

The party, who objects to a witness as attainted, will have to prove the attainder by proceedings in the regular course of law; and the opposite party may produce other proceedings in answer to the objection. If a conviction and judgment are read on the one side, this may be answered on the other by reading a reversal of the judgment upon a writ of error. If the incapacity arises from outlawry under a charge of treason or felony, it will be removed by proof of the reversal of that outlawry. Or if the objection is, that the witness has been attainted by an act of parliament, which subjects him to all the penalties of an attainder, unless he surrenders before a certain day, (which is a kind of parliamentary outlawry,) it may be shown, that the witness surrendered conformably with the act. Such an objection and such an answer occurred on the trial of Lord Lovat (4); and in that case the record of a

(1) This may now be changed to a moderate fine, by st. 19 G. 3. c. 74. s. 3.

(2) St. 4 & 5 H. 7. c. 13.

(3) St. 31 G. 3. c. 35. and 36 G. 3. c. 29. Irish stat.

(4) 9 St. Tr. 652. 665.

proceeding, commenced on the part of the crown. and defended on the part of the witness by a plea of surrender, which the attorney-general confessed to be true, was allowed to be conclusive proof of the fact of his surrender within the limited time.

4. The most effectual mode of restoring the competency of a witness is, by a pardon, either under the great seal, or by act of parliament. Some indeed have thought, that a pardon can only remove the punishment, not the blemish of character. (1) But it is now settled, that a pardon of treason or felony, even after conviction or attainder, not only takes off every part of the punishment, but also clears the party from the legal disabilities of infamy and all other consequences of his crime. (2) * A pardon, whether under the great seal, or by act of parliament, is said to make the witness a new creature, and gives him a new capacity: the crime, indeed, may still be objected against him, as affecting his credit, but cannot be urged against his competency as a witness. And a pardon, by which the king remits the punishment of burning in the hand, is admitted to have the same operation. (3) It is indeed highly expedient, that a pardon should be allowed to have this effect, and that a discretionary power should be vested in the crown to remove such legal incapacities: otherwise, a person, once convicted of felony, would be stigmatised for life, and treated as infamous in courts of law, though in the opinion of mankind his character for truth and honesty may have been completely redeemed. 4. Pardon.

(1) Lord Coke, in Brown v. Crashaw, 2 Bulstr. 154. Dodderidge J. in Harris v. Whyte, Palm. 412. Latch. 81.; and other dicta cited in Hargrave Jurid. Arg. 2 vol. p. 263.

(2) Cuddington v. Wilkins, Hob. 67. 82. Rookwood's case, Rep. temp. Holt, 685. 4 St. Tr. 682. Crosby's case, Lord Raym. 39. Lord Castlemain's case, T. Ray. 379. 2 H. P. C. 278. Hawk. P. C. b. 2. c. 37. s. 48. Com. Dig. Testm. A. 5. Reilly's case, Leach Cr. C. 510.

(3) Rookwood's case, R. T. Holt, 685. Warwick's case, 5 St. Tr. 166. Hawk. P. C. b. 2. c. 37. s. 49.

* The King's prerogative has the same effect in Scotland, in restoring the competency of a convict. See Burnet's History of the Criminal Law of Scotland, p. 405, and the report there of the case of Bell and Mortimer in 1800, in which the rule was fully established.

Pardon in case of perjury.

As in the greater offences, so in those below felony, as perjury at common law, &c., a pardon will restore competency, where the disability is a consequence of the judgment. (1) But where the disability is declared by act of parliament to be part of the punishment, as in the case of a conviction for perjury or subornation of perjury on the stat. 5 Eliz. c. 9., the king's pardon will not make the witness competent. (1) In this case the statute expressly provides, that he shall never be admitted to give evidence in courts of justice, until the judgment be reversed.

Conditional pardon.

If the pardon is conditional, the performance of the condition ought to be shown (2); for on that depends all its efficacy. Thus, where the pardon is on condition of transportation for a number of years, the witness is not competent before the expiration of the term or other lawful determination. (3)

Proof of pardon.

To prove that a witness after conviction has been restored to his competency by pardon, the general rule is, that it will be necessary to produce the pardon itself under the great seal. A warrant under the privy seal or sign manual, for the pardon of burning in the hand, is not sufficient for this purpose, as it is not of itself a complete irrevocable pardon, the warrant being countermandable. (4)

Sect. II.

Of the Admissibility of Accomplices.

General rule.

It has been before mentioned, that a witness is not incompetent from infamy of character, unless a conviction and judgment are proved, though he may confess himself guilty of an

(1) 2 H. P. C. 278. R. v. Greepe, 2 Salk. 514.; 1 Ld. Raym. 256. S.C. R. v. Ford, 2 Salk. 690. Crosby's case, 2 Salk. 389. Bull. N. P. 292. Hawk. b. 2. c. 46. s. 112. R. v. Warden of the Fleet, Rep. temp. Holt, 135. Anonym. case, 3 Salk. 155.

(2) Hawk. b. 2. c. 37. s. 45.

(3) Hawk. b. 2. c. 37. s. 45. Burridge's case, 3 P. Wms. 485.

(4) Lord Warwick's case, 5 St. Tr 171. Gully's case, Leach Cr.C. 116 See R. v. Miller, 2 Blac. Rep. 797.

infamous crime. Nor is it a sufficient objection to his competency, that he has been an accomplice in guilt with the prisoner at the bar. The evidence of accomplices has been at all times admitted (1), from a principle of public policy and from necessity, as it is scarcely possible to detect conspiracies and many of the worst crimes without their information. But though accomplices are received as witnesses, their testimony ought to be received by a jury with a sober degree of jealousy and caution; for, on their own confession, they stand contaminated with guilt, and in the hope of lessening their own infamy will often be tempted to throw as much guilt as possible upon the prisoner. They may be also in some cases entitled to rewards on the prisoner's conviction, and in all cases expect to earn a pardon; and as fear is usually their motive, the same feeling may tempt them to exaggerate their evidence, for the purpose of destroying their former associate and securing themselves against his vengeance.

Approvement.

The practice of admitting accomplices to give evidence against their associates, has been adopted from analogy to the ancient doctrine of approvement; a part of the old law, which, though now grown obsolete, may properly be mentioned here, from its affinity to the more improved modern usage substituted in its place. (2) Approvement is, when a prisoner arraigned on a capital charge, confesses the fact before plea pleaded, and accuses his accomplices of the same offence. He must also discover upon oath, not only the particular crime charged upon him, but all treasons and felonies, of which he can give any information. It is then in the discretion of the Court either to refuse or admit him to be an approver; and if on his confession it appears, that he was a principal and tempted the others, he ought not to be received. But if he does not discover the whole truth, or, on the trial of the appeal, the party accused should be acquitted, judgment of death passes against him upon his own confession of the indictment.

(1) 1 H. P C. 303. Hawk. b. 2. c. 46. s. 94. Gilb. Ev. 123. Charnock's case, 4 St. Tr. 594. Rookwood's case, 4 St. Tr. 663. Atwood's case, cited by Grose, J. 7 T. R. 609. Westbeer's case, Leach Cr. C. 14. And see on this subject the report of the proceedings under a special commission at York, in 1813, pp. 17. 150.

(2) Rudd's case, Cowp. 335.

Modern practice.

This practice of allowing approvements, which was at all times in the discretion of the Court, is now grown into disuse, and entirely discontinued; more mischief having arisen from false accusations under pretence of approving, than benefit to the public by the discovery and conviction of real offenders. (1) Whatever good was to be expected from this old method, is now more effectually provided for and secured by one of the following methods. First, there are several acts of parliament, which enact, in cases of robbery (2), coining (3), burglary (4), housebreaking (4), horse stealing (4), privately stealing to the value of five shillings from shops, warehouses, stables, and coach-houses (4), or uttering counterfeit money (5), that, if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, he shall be entitled to pardon for such crime, on their conviction. Another method is by special proclamations in the Gazette or otherwise, promising pardon on certain conditions.

Rule for admitting accomplices.

But the practice most generally adopted is that of admitting accomplices to give evidence for the crown, under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth, that is, of all the offences about which they may be questioned, and of all their associates in guilt. (6) On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial, they have an equitable title to a recommendation for the king's mercy. They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time to make an application in another quarter. (7) And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to answer

(1) 2 Hale P. C. 227. ch. 29.
(2) St. 4 W. & M. c. 8. s. 7
(3) St. 6 W. 3. c. 17. s. 12.
(4) St. 10 W. 3. c. 23. s. 5. St. 5 Ann. c. 31. s. 4.
(5) St. 15 Geo. 2. c. 28. s. 4.
(6) Rudd's case, Cowp. 339.
(7) Cowp. 339.

for his share of guilt in the transaction. It is not a matter of course, to admit an offender as witness on the trial of his accomplices, not even after he has been so allowed by the committing magistrate; but a motion for this purpose must be made by the counsel for the prosecution, and the Court, under all the circumstances of the case, will either admit or disallow such evidence, as may most effectually answer the purposes of justice. (1)

The general rule then is, that a person who confesses himself guilty of a crime, is a competent witness against his partners in guilt. Thus, if two or more persons are accomplices, one, who is not indicted, may be witness against the others, though he has had a promise of pardon or of reward on condition of giving evidence against the prisoner (2): so he may, even after conviction, if judgment has not passed upon him; for it is not the conviction, but the judgment, that creates the disability. If several persons are indicted together, and one of them pleads guilty and is fined, after payment of the fine he may be a witness against the others. So, on the trial of one of several persons, who are indicted separately, the others, who have not been convicted, may be witnesses in his behalf. (3) It was formerly thought, from analogy to the ancient doctrine of approvement, that an accomplice, separately indicted for the same offence, could not give evidence against the others, unless he had first pleaded guilty to his indictment (4); but the rule is now settled as above stated.

On the trial of an accessary, for a misdemeanor in receiving stolen goods, under stat. 22 G. 3. c. 58., the principal felon is a competent witness; the statute enacting, that the accessary may be proceeded against, although the principal felon has not been convicted, and whether he be or be not amenable to jus- Principal felon, competent.

(1) Buller J. Maidst. Ass. 1798. Crown Circ. Com. last edit. 51.

(2) Tonge's case, Kel. 17. 1 H. P. C. 303. S. C. Layer's case, 10 St. Tr. 259. Hawk. P. C. b. 2. c. 46. s. 135.

(3) Case of Bilmore and others, 2 H. P. C. 279. 1 H. P. C. 305. Gunston and Downes, 2 Roll. Ab. 685. pl. 3. Hawk. b. 2. c. 46. s. 99. Gilb. Ev. 118. Bath v. Montague, cited Fortesc. Rep. 247.

(4) Sir P. Cresby's case, 1 H. P. C. 303.

tice. (1) So, the principal felon may be a witness, in a prosecution on stat. 4 G. 1. c. 11., for taking a reward to help to stolen goods. (2)

Accomplice in misdemeanors and trespasses.

The evidence of accomplices is also admitted on the trial of smaller offences. Thus, in an information under stat. 2 G. 2. c. 24., for bribery at an election, a person, who had received a bribe, was admitted a witness against the defendant, though in case of a conviction he would have been indemnified from the penalties of the act. (3) In an action of trespass, a co-trespasser, who is not sued, may be witness against the defendant, though left out of the declaration for that purpose, and although satisfaction from one is a discharge for all the rest. (4) A person, who has set his name as subscribing witness to a deed or will, is admissible to impeach the execution of the instrument (5), although his evidence is to be received with all the jealousy necessarily attaching to a witness, who, upon his oath, asserts to be false, what he has by his solemn act attested as true. (6)

Confirmatory evidence.

Since accomplices are competent witnesses, it necessarily follows, that, if their evidence is believed by a jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence as to his identity. (7) But their testimony alone is seldom of sufficient weight with a jury to convict the offenders; the temptation to commit perjury being so great, where the witness by accusing another may escape himself. (8) The practice, therefore, is to advise the jury to regard the evidence of an accomplice, only so far as he may be confirmed, in some part of his testimony, by unimpeachable testimony. It

(1) Haslam's case, 1 Leach Cr. C. 467. Price's case, ib. 468. n. (1.) Patram's case, 2 East P. C. 782.

(2) Wild's case, 2 East P. C. 782.

(3) Bush v. Rawling, Say. 289. cited by Lord Mansfield, Cowp. 199. Snead v. Robinson, Willes, 423. and n. (c), ib. 425

(4) Bull. N. P. 286. Luttrel v. Reynel, 1 Mod. 283. Chapman v. Graves and others, 2 Campb. N. P. C. 333. n.

(5) Lowe v. Joliffe, 1 Blac. Rep. 365. 7 T. R. 604. 611. 6 East, 195.

(6) 1 Ves. & Beam. 208.

(7) Atwood's case, 2 Leach Cr. C. 521 Durham's case, ib. 538. By Ld. Ellenborough C. J. in R. v. Jones, 2 Campb. 133. S. P. 7 T. R. 609.

(8) By Ld. Mansfield C. J., Cowp. 336.

is not necessary, that he should be confirmed in every circumstance, which he details in evidence: for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. Nor need it appear from the confirmatory evidence, that he speaks truth with respect to all the prisoners, or with respect to the share which each had in the transaction. But if the jury are satisfied, that he speaks truth in those parts, in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe, that he also speaks truly with regard to the other prisoners, as to whom there may be no confirmation. (1)

Witness invalidating an instrument to which he is party.

The cases which have been mentioned, respecting the evidence of accomplices, and on the admissibility of persons to prove the forgery of an instrument, which they have signed as subscribing witnesses, clearly show, that a man's guilt in the transaction disclosed is not a sufficient reason for rejecting his testimony, however it may affect his credibility. In the case of Walton v. Shelley (2), which was an action upon a bond given by the defendant, in consideration of delivering up certain promissory notes, the Court of King's Bench held, that the indorser of one of the notes ought not to be allowed to prove the consideration of the note usurious, on a supposed principle of public policy, "that no party, who had signed a paper or deed, shall ever be permitted to give testimony to invalidate that instrument: because every man, it was said, who is a party to an instrument, gives a credit to it: and it is of consequence to mankind, that no person should hang out false colours to deceive them, by first affixing his signature to a paper, and afterwards by giving evidence to invalidate it." This appears to have been the first case in support of such a rule, and its authority may now be questioned.

In the later case of Jordaine v. Lashbrooke (3), this subject

(1) By Thomson B. in R. v. Swallow and others, Trials at York. Jan. 1813, on special commission, p. 3. 17. 50. 150. 165. 201.

(2) 1 T. R. 296.

(3) 7 T. R. 601. Ashhurst J. contra. See Jones v. Brooke, 4 Taunt. 464. 1 Ves. & Beam. 208.

was very fully discussed; and the Court there determined, that in an action on a bill of exchange against the acceptor, the payee, who was also indorser, was a competent witness for the defendant, to prove, that the bill, which was unstamped, and purported to be drawn at Hamburgh, was in fact drawn in London, and therefore void for the want of a stamp. "I find no rule," said Mr. Justice Lawrence in delivering his opinion, "less comprehensive than this, that all persons are admissible witnesses, who have the use of their reason and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by interest. I am not aware of any case solemnly decided, except that of Walter v. Shelley, in which a witness has been rejected as incompetent, but upon the ground of some exception which may be classed under one or the other of these heads. Under none of these classes does the witness in this case fall; and the constant practice of examining accomplices, and the case of a witness to a forged will who has obtained probate, show, that the mere circumstance of a man's representing himself as having done things inconsistent with common honesty is not sufficient to reject his testimony, however it may weaken and impeach it. Nor is there any distinction with respect to negotiable securities, when the point to be considered is the competency of the witness; for supposing what he has done in putting such instruments into circulation to be ever so great a fraud and ever so mischievous, he still is a witness unconvicted of any crime, and without interest, and not more devoid of principle than many who have been mentioned as constantly admitted. Whether a defendant shall be allowed to set up such a defence, is quite another consideration, than whether the witness be competent. It certainly is of consequence to prevent men from hanging out false colours: but this must be applied to the parties in the cause, or you may prejudice men who have not hung out such colours."

CHAP. V.

Of the Incompetency of Witnesses from Interest.

THE fourth ground of incompetency is interest.

It is a general rule, that all witnesses, interested in the event of the cause, are to be excluded from giving evidence in favour of that party, to which their interest inclines them. They are excluded from a supposed want of integrity; and not, as some have supposed, that they may be saved from the temptation to commit perjury. If that were the true principle, there would be some inconsistency in excluding witnesses, who have an interest even to the smallest amount, at the same time that a son is allowed to give evidence for the father, and a witness is not privileged from answering against his interest. The temptation to perjury may be much stronger in these two last cases, than in the former; yet in the former the witness will be permitted, in the latter compelled to give evidence. "Where a man," says Chief Baron Gilbert, "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause of belief; for men are generally so short-sighted, as to look at their own private benefit which is near to them, rather than to the good of the world, that is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony, than to believe it." **Principle of the rule.**

In treating of the incompetency of interested witnesses, it is proposed to consider the subject in the following order:—

First, with respect to the nature of the interest, which will disqualify;

Secondly, of the rule on the subject of interest, considered with reference to the parties in the suit;

Thirdly, of the same rule considered with reference to the husband or wife of the party;

Fourthly, of the effect of admissions by a party to the suit, or by his agent, against the party's interest.

Fifthly, of the admissibility of the confession of a prisoner against himself;

Sixthly, of the competency of the party injured, as witness in criminal prosecutions;

Seventhly, of certain exceptions to the general rule on the subject of interest; and

Lastly, of the means by which the competency of an interested witness may be restored.

Sect. I.

Of the Nature of the Interest, which disqualifies a Witness.

It is scarcely possible to reconcile the earlier cases on this subject with those of a more recent date. The old cases respecting the incompetency of witnesses, were generally decided on very narrow grounds. Evidence, which ought to have been admitted, although received with caution, was at once excluded without being heard; as if juries were not to be trusted with all the means of deciding right, because it was possible their decision might be wrong. "The old cases on the competency of witnesses, said Lord Mansfield (1), have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistently with those

(1) Walton v. Shelley, 1 T. R. 300. cited by Ld. Kenyon in Bent v. Baker, 3 T. R. 32.

authorities, to let the objection go to the credit rather than to the competency of a witness." At one time it was generally held, that, if a witness had an interest in the question put to him, he was incompetent. Thus it has been laid down in some of the earlier cases, as a general rule, that one commoner cannot be a witness for another commoner; and that in an action on a policy of insurance one underwriter cannot be a witness for another. But a distinction has since been made between an interest in the question put to a witness, and an interest in the event of the suit (1); and the general rule now established is, that a witness will not be disqualified on the ground of interest, unless he is interested in the event of the suit.

The question then resolves itself into this, whether the witness, proposed to be examined, has an interest in the event. In considering this subject, the simplest method will be to ascertain, in the first place, what is not such an interest in the event as will disqualify a witness from giving evidence; and then to enquire, what is such an interest, as will disqualify him.

I. First, what is not such an interest as will disqualify?

It is not an objection to the competency of a witness, that he may have wishes or a strong bias on the subject-matter of the suit, or that he may expect some benefit from the result of the trial. Such circumstances may influence his mind, and affect his credibility; they are therefore always open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can have on his testimony; but they will not render him incompetent.

Witness, in same situation as the party.

A witness, who stands in the same situation as the party, for whom he is called to give evidence, is under a strong bias,

(1) 1 T. R. 302. 3 T. R. 36. 7 T. R. 603.

and may have strong wishes upon the subject; but is not on that account disqualified. Thus if there are two actions brought against two persons for the same assault, in the action against one the other may be witness (1); or if several persons are separately indicted for perjury in swearing to the same fact, either of them before conviction may be a witness on the trial of the others. (2) So, in Rudd's case, a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, that, in case of his conviction, her husband would receive a pardon. (3)

Upon the same principle, in the case of Bent v. Baker, which was an action against an underwriter on a policy of insurance, the court held, after much argument, that another underwriter was a competent witness. (4) This case came before the Court of King's Bench, by writ of error from the Court of Common Pleas; a writ of error was afterwards brought to reverse the judgment of that court (5), but was at length abandoned. It has always been considered a case of great authority, and deserves to be particularly noticed, as it is one of the leading cases, which have established the rule of evidence on this subject. The principal question in that case was, whether a person, who had been employed as broker by the plaintiff in procuring the policy to be subscribed by the defendant, and had afterwards himself subscribed the policy as assurer, was a competent witness for the defendant. The court adjudged that he was competent; Lord Kenyon C. J., Mr. Justice Buller, and Mr. Justice Grose held, that he ought not to have been rejected, on the broad and general ground, because he was not interested in the event; Mr. Justice Ashhurst, on a narrower ground, because the witness stood in the particular situation of broker; and, having made himself a party to the policy, he ought not to be allowed

(1) By Buller J. 1 T. R. 301.

(2) Bath v. Montague, cit. Fortesc. Rep. 247. Gunstone v. Downes, 2 Roll. Abr. 685. Art. 3.; S. C. cited 2 H. P. C. 280. and in R. v. Gray (or Bray), 2 Sel. N. P. 1046.

(3) 1 Leach Cr. C. 151.

(4) 3 T. R. 27. Bull. N. P. 287. S. P.

(5) 7 T. R. 604.

by his own act to deprive either party of the benefit of his testimony. The other judges also concurred in that opinion; but Lord Kenyon C. J. declared, that the other was the principal ground of his opinion. He said, "The objection is, that the witness was underwriter on the same policy. I must acknowledge, that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider, what are the principles and good sense to be extracted from them all. I think the principle is this; if the proceeding in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject: for that only goes to his credit, and not to his competency."

Examples of competent witnesses.

The vendor of an estate, who has sold the inheritance without any covenant for good title or warranty, is competent to prove the title of the vendee. (1) So, in an action of trover for a horse, a person who accepted the horse as a security for the payment of a sum of money, and afterwards on default sold it to the defendant, is competent to prove these facts; (2) the verdict in this case can neither be used by the witness nor against him. In an action on a contract, a dormant partner, not being one of the contracting parties, and who has had no privity of communication with them in the contract, is competent to prove the contract. (3) In an action of covenant for the mismanagement of a farm, the sublessee of the defendant is competent to prove its proper cultivation. (4) In an action on a policy of insurance, when the only question is concerning the original destination of the ship, the captain is competent to give evidence respecting that fact, though a part-owner of the ship, and, as such, liable to the owners of the goods, in case the ship had unnecessarily deviated from the voyage; but, if the question turn on a deviation, he could not be examined. (5) In an action against a defendant for falsely representing the

(1) Busby v. Greenslate, 1 Str. 445.
(2) Nix v. Cutting, 4 Taunt. 18.
(3) Mawman v. Gillett, 2 Taunt. 325. n.
(4) Wishaw v. Barnes, 1 Campb. 341.
(5) De Symonds v. De La Cour, 2 New Rep. 374.

circumstances of a third person, who was insolvent, that person is competent to prove himself insolvent. (1) In these cases, the witness neither gains nor loses directly by the event of the verdict; nor would the verdict be evidence either for or against him.

Obj. that the verdict may be heard of by the jury.

A witness is not incompetent on the ground, that the verdict may afterwards come to the hearing of a jury, in an action brought by the witness himself, and so have an influence on their judgment, though not in evidence before them. Lord Holt, indeed, in the case of the King v. Whiting (2), on an indictment for a cheat, in obtaining a person's subscription to a note of 100l. instead of 5l., rejected the evidence of the maker of the note; Lord Holt said, the verdict would be certainly heard of, in an action on the note, to influence the jury. This decision was followed by Lord Hardwicke C. J. in the case of the King v. Nunez (3): but afterwards, in the case of the King v. Bray (4), Lord Hardwicke reviewed his own opinion and that of Lord Holt, and decided that the objection went only to the credit, and not to the competency of the witness; and with respect to the possibility that the jury might hear of the verdict, he said, that, sitting as judge, he could only hear of it judicially.

Upon the same principle, in the case of the King v. Boston, (5) where A having brought an action against B, (who filed a bill in equity for an injunction, and, after answer put in by A, denying the allegations in the bill, the injunction was dissolved,) A was afterwards indicted for perjury alleged to have been committed in his answer, and the indictment came on to be tried immediately before the action, the Court of King's Bench determined, that B was a competent witness, and had been properly admitted to give evidence on the trial; as he could not avail himself of the conviction of A, in any civil proceedings between them either in law or equity. So a per-

(1) Smith v. Harris, 2 Starkie, 47.
(2) 1 Salk. 283.
(3) 2 Stra. 1043.
(4) Rep. temp. Hard. 358.
(5) 4 East, 572.

son, who has borrowed money on an usurious transaction, is a competent witness for the plaintiff in an action for penalties against the lender (1); and whether he has, or has not, repaid the money lent, does not appear to make any essential difference, at least so far as his competency is affected (*); for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. A mere contingent benefit, then, which may result to the witness from the event of the suit, (as, that it may possibly be more easy for him to establish his own claim, in case the party calling him should succeed,) can only affect his credit and not his competency, unless the verdict would be evidence for him in an action brought by or against himself.

Liability to information or action.

A witness, who has acted under a bare authority, is not to be excluded from giving his testimony, on the ground, that he may be liable to an information or an action, in case the fact, which he comes to prove, should be found otherwise. (2) Thus persons, who have been themselves in office, are often

(1) Abrahams q.t. v. Bunn, 4 Burr. 2251. Smith v. Prager, 7 T. R. 60. See Masters v. Drayton, 2 T. R. 496.

(2) R. v. Bray, Rep. temp. Hard. 360. 2 Sel. N. P. 1045. S. C. 2 Str. 1069. S. P. Baillie v. Wilson, cited 4 Burr. 2254. See Carpenters' Company, &c. v. Hayward, 1 Doug. 374.

* In the case of Smith q. t. v. Prager, the witness said, he had repaid the principal sum and interest by drafts, which had been duly honoured, and that he was still indebted to the defendant, on a running account for this and other loans. It may be observed, that, at the time of the trial, the witness was an uncertificated bankrupt: but this was not considered as furnishing any objection. (See Masters q. t. v. Drayton, 2 T. R. 496. See also Ridley v. Taylor, 13 East, 175.) In the first case cited, of Abrahams q. t. v. Bunn, the witness proved, that he had redeemed the pledges and repaid the principal sum, and he was competent to prove that fact. Lord Mansfield is reported to have said, "that if the defendant had produced a security or proved the pledge to be remaining in his custody, it would have been a different consideration, whether the witness, who was the borrower of the money, could be examined to contradict this." However it may be inferred from the case of Jordaine v. Lashbroke, which has been before mentioned, that this consideration would not now affect the competency of the witness.

called to show what the usage is, and what they did when in office; yet if their acts be illegal, they are liable to a quo warranto. (1) If persons were not allowed to be competent witnesses, in matters belonging to corporations, because they may possibly be punished by information, much good evidence would be shut out. Wherever any unlawful act is done in a corporate assembly, the whole assembly are liable to an information; yet the persons, who were present at such assemblies, are always allowed to be good witnesses; and if they were not allowed, there would be no evidence at all as to such facts. (2)

In an action against an administrator, one of the bond-securities for the defendant's due administration of the intestate's effects is a competent witness, on behalf of the defendant, to prove a tender (3); the Court said, the bare possibility of an action being brought against a witness is no objection to his competency, and that a creditor of the defendant would also have been competent, which they considered a stronger case; and Mr. Justice Buller said, " In order to show a witness interested, it is necessary to prove, that he must derive a certain benefit from the determination of the cause one way or the other. Then in this case, supposing there were no assets, though the defendant would be answerable for the costs, he would not liable on his bond to the Ecclesiastical Court. He is only bound to distribute the intestate's effects, and it does not appear in this case how they have been applied."

A witness may prove a codicil made subsequent to a second will, and reviving a former will, though he has acted under the first will, and might be liable to actions as executor de son tort, if it should be set aside. (4) Indeed, it may be laid down as a general rule, that executors in trust, trustees, and agents, are not incompetent merely on the ground of their liability to action. (5) If a trustee takes a beneficial interest,

(1) See note (2) in preceding page.

(2) By Lord Hardwicke C. J. R. v. Gray (or Bray), 2 Selw. N. P. 1045.

(3) Carter v. Pearce, 1 T. R. 163.

(4) Baillie v. Wilson, cit. 4 Burr. 2254. Goodtitle d. Fowler v. Welford, 1 Doug. 140.

(5) 1 Mod. 107. Goss v. Tracy, 1 P. Wms. 287. 1 Blac. Rep. 366. Gilb. Ev. 123.

that is another ground of objection; but, without such an interest, trustees and executors are competent witnesses. (1)

In the cases, which have been mentioned, the objection against the witness was, that, either from the circumstance of his standing in the same situation as the party for whom he was called, or because the verdict might possibly influence the jury in a cause in which he himself might be party, or from some other cause of the same kind, that he expected a benefit from the result of the suit. The witness in those cases would probably have admitted, that he believed himself interested; it was upon the supposition of this fact, that the objection must have been founded. Those cases, therefore, in which such objections were overruled, appear to have determined this point, that a witness will not be incompetent merely on the ground of his believing himself interested. It is true, if he believes himself interested, the impression on his mind, and his bias in favour of the party calling him, may be as strong, as if he were legally incompetent. But the difference is, that, in the one case, the enquiry is more simple and more easily defined; in the other, it is complicated, vague, and uncertain. For the purpose of determining that a witness is incompetent on account of his believing himself interested, it might be necessary to examine him on a great variety of points, which after all would be more proper for the consideration of the jury; as, for example, on the nature of the benefit which he expects, the reasons for his expecting it, and the impression which such an expectation may have produced upon his mind. Such an enquiry would in all cases be extremely indefinite, and would be subject to this great inconvenience, that it might lead to the rejection of a witness, who on further examination might appear to deserve the highest credit, and might have it in his power to give important evidence. Witness believing himself interested.

The rule of law respecting interested witnesses, is perhaps

(1) Goodtitle dem. Fowler v. Welford, 1 Doug. 140. Bettison v. Bromley, 12 East, 250. Heath v. Hall, 4 Taunt. 328. Phipps v. Pitcher, 6 Taunt. 220. 2 Marshall, 20. S. C. See 1 Ball and Beatty's Rep. 400. 414. and cases there cited, as to the rule in equity.

the best that could be adopted, because it is the least exclusive, and most accurately defined. It excludes such only as have an interest in the event of the suit; not, that in all cases they are likely to feel a stronger bias than persons, who may perhaps expect some benefit from the event, or may be friends or relations to the party, and yet are not on that account incompetent; but the kind of interest, which is marked out as the cause of incompetency, is in general more direct and immediate, and more easily ascertained. It has been held, therefore, that a witness is not incompetent, who believes himself under an obligation of honour to indemnify the bail, unless he has in fact entered into an engagement to that effect. (1) Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognized in courts of justice, as a motive of conduct. Besides, where the sense of honour is so strong and binding as to influence him against his interest, it must be unnecessary to reject the witness; as the same principle, which would induce him to pay the costs, would oblige him, in giving his evidence, to speak only the truth; and, in cases where the sense of honour is less firm and imperative, the ground of the objection fails, since the witness is not bound in point of law, and does not feel himself absolutely bound in point of morals. But, independent of this reasoning, another more general answer is, that the ends of justice are most effectually attained by a full and complete investigation of the subject in dispute; and, unless the objection to the witness is strictly a legal objection, he will be admitted to give evidence. In the case supposed, of a witness who says he thinks himself bound in honour to pay the costs, it might be injurious to the party, who calls him, to be deprived of his testimony on account of such a fancied obligation; more especially, as it is an obligation which may easily be pretended by the witness, but which it is scarcely possible for the court justly to appreciate, and which from the nature of the case the party cannot release, nor yet enforce against the witness; on the other hand, his testimony may not

(1) Pederson v. Stoffles, 1 Campb. 145. S. P., said to have been ruled contra, in an old case, by Parker C.J.; see Fotheringham v. Greenwood, 1 Str. 129.

deserve all the credit due to a witness free from bias, and it ought therefore to be strictly examined and sifted. The witness, then, is to be heard, but his evidence is open to observation.

However, it is to be observed, there are several dicta in favour of the position, that a witness is not competent, if he believes himself interested, whether he is or is not interested in strictness of law. (1) But these dicta were not the ground of the determination in the cases then before the court, nor was it necessary to determine the point; and further, the general rule of law on the subject of interest was not at that time so clearly settled, as it has since been by many later authorities. In a late case (2), before the High Court of Admiralty, an objection was made to the evidence of a witness, who had acknowledged in his answer "that he could not say he was not interested, inasmuch as he conceived he would be entitled to share, if his vessel should be pronounced a joint captor, though he had signed a release;" on the other side it was contended, that as he was clearly not interested, the effect of his impression was no more an objection in this case, than in those in which the expectation depended only on the bounty of the parties. But Sir William Scott rejected the evidence, observing, "he had always understood the distinction to be, that, if the witness says only that he expects to share from the bounty of the captors, he is not disqualified or rendered incompetent, whatever may be the deduction of credit to which he is exposed. But if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be."

II. Secondly, having shown what is not such an interest in the event of the suit, as will disqualify a witness from giving evi-

(1) By Pratt C. J. in Fotheringham v. Greenwood, 1 Str. 129. cited and approved by Ld. Loughborough C. J., and by Gould J. in Trelawnay v. Thomas, 1 H. Bl. 307. S. P. by Perryn B. in Newland's case, 1 Leach Cr. C. 353. And see a case tried before Ld. Mansfield, cited by counsel in Rudd's case, Leach Cr. C. 154.

(2) Case of the Amitié, Villeneuve, 5 Robinson, Adm. Rep. 344. n.

dence, we now proceed to enquire, what is such an interest as will disqualify.

On the subject of interested witnesses, Ch. B. Gilbert lays down the rule thus: "The law looks upon a witness as interested, where there is a certain benefit or disadvantage to the witness, attending the consequence of the cause one way." (1) Mr. Justice Buller adopts the same rule. (2) And, in the case of the King v. Prosser, where the question was, whether on an appeal against a rate, parishioners, who had rateable property but were not actually rated, were competent witnesses in support of the rate, the same learned judge expressed himself thus: "I take the rule to be this; if the witness can derive no benefit from the cause before the court, (meaning evidently from the context, no immediate benefit,) he is competent." (3)

I. Where the verdict is evidence for or against the witness.

First, if the witness can avail himself of the verdict, so as to give it in evidence in support of his own claims, or if the verdict can be used in evidence against him, in case the party, for whom he is called as witness, should fail in the action, that is a direct and immediate interest in the event of the suit, which will render him incompetent. (4) This rule may be illustrated by the following examples.

1. Servant.

In an action against a master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence: for the verdict may be given in evidence, in a subsequent action by the master against the servant, as to the quantum of the damages, though not as to the fact of the injury. (5) A broker is not competent, for the same reason, in an action against the principal, to disprove the negligence of the defendant in the course of his employment. (6.)

(1) Gilb. Ev. 106, 7.
(2) Bull. N. P. 284.
(3) 4 T. R. 17.
(4) 3 T. R. 32, 33. 36. 7 T. R. 62. 4 East, 582.
(5) Green v. New Riv. Company, 4 T. R. 589. Martin v. Henrickson, 2 Ld. Raym. 1007. Miller v. Falconer, 1 Campb. 251. 15 East, 474. 2 Campb. 516.
(6) Gevers v. Mainwaring, 1 Holt, N. P. C. 139.

In an action against a sheriff for an improper return to a writ of *fieri facias*, in which he stated that he had paid a sum of money to the landlord of the premises for arrears of rent, the landlord is not competent to prove the rent due; for if this action were to succeed, the witness would be liable to an action at the suit of the sheriff, in which their judgment in this case would be evidence of special damage. (1)

Commoners and persons claiming in the same right.

Where a right of common is claimed by custom, one, who claims under the same custom, cannot be a witness in support of the claim, as he might afterwards use the verdict in his own cause, to establish a similar customary right for himself. (2) So, where in an action on the case against the defendant for not repairing his fences contiguous to a common, (on which common the plaintiff prescribed for common appurtenant,) one of the points in issue was, whether the defendant was liable to repair by reason of his occupation, it has been determined, that other persons, who claimed a right of pasture over the same common, were not competent witnesses for the plaintiff (3); the Court said, the record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence; and though the plaintiff in that case claimed a right of common by prescription in right of a particular messuage, still the other commoners, by whatever title they might claim, would have a common interest in casting the burthen of the repair of this individual fence upon the occupier of the adjacent land. So, where the question is, whether in a particular parish or vill certain things are generally exempted from tithes, or subject only to a modus, no persons, who would be subject to tithes, if the parson's claim were to be allowed, can give evidence in support of the modus or exemption. (4) So, where a defendant in an action of trespass justifies under a custom in the parish for out-going tenants to take the away-going crop, he cannot call as witness an occupier of land, who insists upon the same right for himself.

(1) Keightley v. Birch, 3 Campb. 521.

(2) 1 T. R. 302. 3 T. R. 32. Bull. N. P. 283. Hockley v. Lamb, 1 Ld. Raym. 731.

(3) Anscomb v. Shore, 1 Taunt. 261.

(4) Ld. Clanricard v. Lady. Denton, 1 Gwill. 360. Gilb. Ev. 113.

On the trial of an issue, whether the owners of property within a chapelry are liable by immemorial usage to a charge of repairing the chapel, an owner of property within the chapelry is not a competent witness to disprove the liability, though his property is in the occupation of a tenant, who agrees to pay rent without any deduction; for he is immediately interested in removing such a permanent charge, and thus improving the value of his estate. (1) And in an action against the defendant for exercising a trade in breach of a custom, which, as was alleged in the declaration, confined that and other trades to the members of a corporate company, a witness who claims for himself a right to exercise a trade, though not a member, is not competent to negative the existence of such a custom; for he is interested, that the Defendant should have a verdict, which he may use in his own defence, in case a similar action should be brought against himself. (2)

Where the issue does not affect any common right, but is merely on a right of common claimed by prescription, as belonging to the estate of A, one who claims a prescriptive right of common in right of his own estate may be a witness (3); for though A may have such a right of common, it does not follow that B has, nor would the verdict in the action of A be evidence in B's action. "It is no good objection to a witness," says Ch. B. Gilbert (4), "that he has common by cause of vicinage in the lands in question, for this is no interest in the land, but only an excuse for trespass; and let who will recover the lands, the whole right of common remains, so that he is certainly indifferent in point of interest between the two contenders." However, this position may perhaps be doubted, as the rule is now clearly established, that a witness, who can use the verdict in an action brought either by or against himself,

(1) Rhodes v. Ainsworth, 1 Barn. & Ald. 87.

(2) Comp. of Carpenters in Shrewsbury v. Hayward, 1 Doug. 375.

(3) Harvey v. Collison, MS. case, stated 1 Sel. N. P. 449. 1 T. R. 302. Bull. N. P. 283.

(4) Gilb. Ev. 109.

is not competent; and since common by cause of vicinage is in the nature of common appendant, and implies immemorial usage of intercommoning, it is presumed, that a verdict, finding the existence of such an usage, would be evidence for the witness, if he were to justify under the same usage in an action of trespass. It may be observed, that Ch. B. Gilbert does not once mention the power of using the verdict, as a criterion for determining, whether the witness is incompetent; so undefined, at that time, was the rule of evidence on this subject.

Upon the same principle it was determined, that, on an appeal against an order of removal, if the appellants proved a settlement in a third parish, the rated inhabitants of that parish were not competent witnesses, for the respondents, to disprove it; as the confirmation of the order of removal would be conclusive evidence for the inhabitants of the third parish, that the settlement of the pauper was at that time in the appellant parish. (1) It would indeed be quite as conclusive in favour of any other parish in the kingdom; so that the proposed witness had a greater interest in the question than any other person, only in proportion as there was a greater probability, that, if the respondents failed in this appeal, they would afterwards remove the pauper to his parish. Such an objection, however, is now removed by the statute 54 G. 3. c. 170. the 9th section of which enacts, " that no inhabitant or person, rated or liable to be rated to any rates for any district, parish, &c., shall be deemed to be by reason thereof an incompetent witness for or against such district, &c., in any matter relating to such rates, or to any order of removal to or from such district, &c., or to the settlement of the pauper in such district." Before this provision, it had been decided, that inhabitants would not be incompetent merely from having rateable property in the parish, if it did not appear that the property was actually rated at the time of the appeal; and this, although it was omitted in the rate, for the very purpose of introducing

3. Rated parishioners.

(1) R. v. Terrington, 15 East, 471.

their evidence. (1) The court held, that in order to disqualify a witness, there must be an actual existing interest at the time, not merely one that is expectant and contingent; and that, by taking the witness off the rate, his immediate interest was so far taken away, that it could not render him incompetent, whatever objections might still be made against his credibility.

4. Tenant in possession.

In an action of ejectment, the tenant in possession, upon whom an ejectment has been served, is not a competent witness in support of the title of the defendant, under whom he holds; for he is liable to the mesne profits, and the verdict in ejectment would be evidence against him in an action to recover them. (2) So, a witness, to whom the lessor of the plaintiff has agreed to demise the lands in question, in case he shall recover them by the verdict in ejectment, would not be competent to give evidence against the defendant; because, in an action for the non-performance of that agreement, the verdict would be evidence for him to prove the fact of the lands having been recovered.

Liability to costs.

Persons liable to the costs of the action have an immediate interest in the event, and therefore are not competent witnesses. Thus the defendants' bail are not competent to give evidence for their principal (3), because they are immediately answerable in case of a verdict against the defendant. If therefore the defendant is likely to require the evidence of one of his bail at the trial of the cause, he must apply to the court, on an affidavit, stating that the bail will be a material witness for him, to have his name struck out of the bailpiece on adding and justifying another in his place. (4)

In an action against the sheriff for a false return, the sheriff's

(1) R. v. Prosser, 4 T. R. 17. R. v. Little Lumley, 6 T. R. 157. R. v. Kirdford, 2 East, 561.

(2) Bourne v. Turner, 1 Str. 632. Doe dem. Forster v. Williams, Cowp. 621.

(3) 1 T. R. 164. Piesly v. Von Esch, 2 Esp. N. P. C. 606.

(4) Tidd, Pr. 264. Collett v. Jennis, Rep. temp. Hard. 133.

officer, who has given security for the due execution of process, is not a competent witness, to prove that he endeavoured to make the arrest. (1) So, in an action by an infant plaintiff, his prochein amy or guardian are not competent witnesses for him, as they are liable to costs. (2) So, in an action of assumpsit for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and to one J. S., who were partners in trade, Lord Kenyon held that J. S. could not be a witness for the defendant to prove, that the goods were sold to himself, and that the defendant was not concerned in the purchase except as his servant; for, said Lord Kenyon, by discharging the defendant he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff. (3)

In an action by an indorsee against the acceptor of a bill of exchange, which had been accepted for the accommodation of the drawer, the drawer is not a competent witness for the defendant, to prove that the holder took the bill for an usurious consideration. This was lately determined in the case of Jones v. Brooke. (4) The Court of common Pleas there held, that the witness was interested to defeat the action; for, if the holder should succeed against the acceptor, the acceptor would not only have a right of action against the drawer for the principal sum, but also for all damages, which as acceptor he might sustain in being sued upon the bill; the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of his acceptance for the drawer's accommodation. So, in an action by an indorsee against the maker of a promissory note, the payee and indorser, who has become bankrupt since the date of the note, and has obtained

(1) Powell v. Hord, 2 Ld. Raym. 1411.: 1 Str. 650. S. C. 3 Campb. 523.

(2) James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1026. Gilb. Ev. 107. Head v. Head, 3 Atk. 511. 517. See 1 Cox's Cases in Chan. 286.

(3) Goodacre v. Breame, Peake N. P. C. 174. Young v. Bairner, 1 Esp. N. P. C. 103. See another example in Baker v. Tyrwhitt, 4 Campb. 27., stated in another part of this book.

(4) 4 Taunt. 464. See also Trelawney v. Thomas, 1 H. Bl. 306. and Ball v. Bostock, 1 Str. 575. as to the incompetency of witnesses liable to costs.

his certificate, is not competent on the part of the defendant, to prove that the note was an accommodation note, and indorsed to the plaintiff after it became due; for, having obtained his certificate, he is no longer liable to the plaintiff on his indorsement, but he will be liable to the defendant, if the defendant should be obliged by this action to pay the promissory note, which he had given for the witness's accommodation. (1) And in an action on a bill of exchange against the drawer, where the question was, whether the bill had been, as the defendant maintained, delivered by one A. B. to the plaintiff to be discounted, or whether it had been delivered in payment for goods, which A. B. had bought of the plaintiff, Ch. Just. Gibbs held, that A. B. was not a competent witness for the defendant, to prove the former of these facts; for if A. B. had received the bill merely to get it discounted, and, instead of doing so, if he pledged it for his own debt, he would be liable for the costs of this action, as special damage resulting from his breach of duty. (2)

In the case of Ilderton v. Atkinson (3), where the question was, in an action of assumpsit, whether A. B. who had received money due from the defendant to the plaintiff, received it in the character of agent for the plaintiff, the Court of King's Bench held, that A. B. might be called for the defendant to prove his agency, as he was liable either to pay the money received or to refund it to the defendant; and though it was objected, that he had a stronger interest to give evidence in favour of the defendant than on the side of the plaintiff, (since, if he had received the money under a misrepresentation of his own character, the defendant might recover from him the costs of the action then depending as well as the money,) the court held, that the possibility of such a remote interest did not make the witness incompetent. Upon the authority of this case, the case of Birt v. Kirshaw was decided (4); there, the Court of King's Bench were of opinion, that the indorser

(1) Maundrell v. Kennett, 1 Campb. 408. before Bayley J.

(2) Harman v. Lasbrey, 1 Holt. 390.

(3) 7 T. R. 480.

(4) 2 East, 458.

of a note, who had received money from the drawer to take it up, was a competent witness in an action by the indorsee against the drawer to prove on the part of the defendant, that he had satisfied the note; since he would be liable on the note to the plaintiff, if the defendant succeeded, or to the defendant in an action for money had and received, if the plaintiff succeeded; and the Court held, that the witness was not rendered incompetent by the circumstance of his being also liable to the defendant, in the latter case, for the costs of this action in consequence of his non-payment. But in the recent case of Jones v. Brooke (1), which was an action against the acceptor of a bill accepted for the accommodation of the drawer, the Court of Common Pleas held, that the drawer was not a competent witness for the defendant, to prove that the holder received the bill on an usurious consideration; on the ground, that he was bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation, and would therefore be liable to the acceptor not only for the principal sum, but also for all the costs, with which he might be charged in this action. The liability to the costs of the action, as appears from several cases before mentioned, is a substantial objection to the competency of a witness; and however indifferent he may be in other respects towards either party, yet, if he has incurred such a liability, he has an immediate and direct interest in the event of the suit.

II. Direct interest, though the verdict cannot be used.

Secondly, a certain direct and immediate interest will disqualify, although it may happen that the verdict in the cause cannot be evidence, either for or against the witness in any future suit concerning that interest. "The law, says Ch. Baron Gilbert, looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness, attending the consequence of the cause one way." (2) The following examples may be cited to illustrate this general rule.

(1) 4 Taunt. 464. Townend v. Downing, 14 East, 567. Keightly v. Birch, 3 Campb. 523.

(2) Gilb. Ev. 106.

1. Promise of benefit depending on the event.

If a person promise a witness, that, in case he recover the lands, he will grant him a lease of them for so many years, this excludes his evidence; for the witness would have a fixed and certain advantage by the event of the verdict. (1) So a witness has been rejected, who, if the plaintiff failed in the action, was to repay a sum of money in his hands belonging to the plaintiff, but was not to repay any part of it, if the plaintiff succeeded. (2) And in the case of Forrester v. Pigou (3), an action on a policy of insurance, where the defendant called another underwriter, as witness, who in his examination on the voire dire said, he had paid the loss to the plaintiff upon an undertaking, that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money on that event, Lord Ellenborough C. J. on the trial rejected the witness. On a motion afterwards for a new trial on account of this rejection, the Court sent the case to be retried, for the purpose of ascertaining more particularly the time when the undertaking was made to the witness; but on that occasion Lord Ellenborough said, "If a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt beforehand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event, as if he were a party to a consolidation rule."

2. Devisee. Heir.

A devisee, who takes an interest under a will in the testator's estate, is not competent to prove his sanity, in an action of ejectment brought by another devisee against the heir at law. An heir apparent is a competent witness concerning the title of the land; for the heirship is a mere contingency: but a remainder man is not competent on such a subject, having a present estate in the land. (4)

3. Rated parishioners.

Rated parishioners were always considered incompetent,

(1) Gilb. Ev. 108.

(2) Fotheringham v. Greenwood, 1 Str. 129.

(3) 1 Maulé & Sel. 9.

(4) Smith v. Blackham, 1 Salk. 283.

before the late act of parliament (1), to give evidence for their parish in appeals against orders of removal, or on a question concerning the boundary of their parish, on the ground that they were the real parties to the appeal, directly and immediately interested in the event of the proceeding, by which the maintenance of the pauper and the costs of the appeal might be fixed upon their parish, and have the effect of increasing their proportion of the rates. (2) If they had not been actually rated, but merely rateable, then they would not have been incompetent. (3)

A creditor, having an unsatisfied demand upon the estate of a deceased person, which is insolvent, is not competent, in an action brought by the executor or administrator of the deceased, to give evidence on the part of the plaintiff; for though he may not at present have any means of obtaining satisfaction for his debt, yet if the plaintiff succeed in this action, a fund will be created, out of which he may be satisfied: he would give evidence, therefore, to get money for himself through the medium of the plaintiff, who may be considered as his trustee. (4) **4. Creditor.**

A bankrupt is not a competent witness, in an action by his assignees, to prove property in himself or a debt due to himself, or in any other manner to increase the fund. (5) The amount of the allowance, that may be granted to the bankrupt, under the commission, will depend upon the clear amount of his estate recovered by the assignees (6); this is a direct and immediate interest. Nor can the bankrupt prove his own act of bankruptcy, or explain an equivocal act, or prove the petitioning creditor's debt, or any other part necessary to support the commission, not even after obtaining a certificate, and executing a release of his share in the surplus; for, if the com- **5. Bankrupt.**

(1) St. 54 G. 3. c. 170. s. 9.
(2) R. v. Prosser, 4 T.R. 19. R. v. South Lynn, 5 T. R. 667. R. v. Kirdford, 2 East, 561. R. v. Woburn, 10 East, 403.
(3) See ante, p. 57.
(4) Craig v. Cundell, 1 Campb. 381.
(5) Ewens v. Gold, Bull. N. P. 43. Butler v. Cooke, Cowp. 70. Ex parte Burt, 1 Maddock, Rep. 46.
(6) See st. 5 G. 2. c. 30. s. 7.

mission is not good, the certificate and all the proceedings are void, and the bankrupt will be liable again to his debts, from which the certificate would discharge him. (1) For the same reason he cannot be questioned as to any antecedent act of bankruptcy, either in his examination in chief or in his cross examination. (2) And, on a second commission of bankruptcy, a certificated bankrupt cannot be a witness for the assignees under that commission, unless he has paid 15 shillings in the pound; for, in the event of his not making that payment under the second commission, his future effects are liable. (3)

A bankrupt has been admitted, in an action by the assignees to recover money levied under an execution on a warrant of attorney, to prove that the defendant knew of his insolvency, at the time when the execution was issued; such evidence neither affirming nor disaffirming the bankruptcy. (4) And it is an established rule, that a bankrupt may be a witness to *diminish* the fund, though he has not obtained his certificate; because in so doing he speaks most manifestly against himself; for he may not only defeat his title to the benefit, which the law allows him, if the fund is of a certain amount, but he hazards the displeasure of all his other creditors. (5) In an action of assumpsit, therefore, for goods sold and delivered to the defendant, the Court of King's Bench determined, that a witness, who had been twice bankrupt and had not obtained his certificate, was competent to prove, on the part of the defendant, that the goods had been delivered on his, and not on the defendant's, account (6); the direct tendency of such evidence being to diminish the fund. It has been very justly

(1) Cross v. Fox, 2 H. Bl. 279. n. (a); Flower v. Herbert, ib. Field v. Curtis, 2 Str. 829. Chapman v. Gardner, 2 H. Bl. 279. Hoffman v. Pitt, 5 Esp. N. P. C. 22.—The case of Oxlade v. Perchard, 1 Esp. N. P. C. 286. (in which case a bankrupt was admitted to explain a doubtful act of bankruptcy,) has in effect been overruled by the cases of Hoffman v. Pitt and Clapman v. Gardner.

(2) Wyatt v. Wilkinson, 5 Esp. N. P. C. 187.; Elsom v. Brailey, MS. case in 1 Selw. N. P. 239.

(3) St. 5 G. 2. c. 30. s. 9. Kennet v. Greenwollers, Peake N. P. C. 3.

(4) Reed v. James, 1 Starkie, 134. In Brind v. Bacon, 5 Taunt. 183., a bankrupt seems to have been admitted; but the nature of the action and the particular facts, which he was called to prove, are not stated.

(5) By the Court in Langden v. Walker, cited Cowp. 70.

(6) Butler v. Cooke, Cowp. 70.

observed, (1) that although it may be ostensibly against the debtor's interest to enlarge his debts, (which is the same thing in one sense, as to diminish his funds,) yet it may happen to be the bankrupt's interest, from an apprehension of the danger of his discharge being refused, to introduce some creditors who will carry him through all his difficulties. When any thing of this kind is attempted, the evidence of a witness in such a situation must be received with great jealousy.

A creditor of a bankrupt is not competent to increase the fund, out of which he may receive a dividend. (2) He cannot therefore give any evidence to deprive the bankrupt of his allowance. (3) And the petitioning creditor (though he may defeat a commission (4), or cut down his own debt,) (5), is not a competent witness to prove the commission regularly sued out; because he enters into a bond to the Lord Chancellor conditioned to establish the several facts, upon which the validity of the commission depends, and to cause it to be effectually executed. (6) 6. Creditor of bankrupt.

It was held in one case, that a creditor, who had not proved his debt under the commission, was competent to support the commission, though not to increase the estate (7); on the ground that he had no immediate or certain benefit, and it might be as advantageous for the creditor to be allowed to sue his debtor as a solvent person, as to receive a dividend under the commission. However, as a commission of bankruptcy passes the whole of the bankrupt's real as well as personal estate to the assignees, and appropriates immediately to the satisfaction of his debts that which can only be reached remotely and partially by the process of common law, it is in this respect a proceeding evidently favourable to the creditors: and therefore in a

(1) Bell's Commentaries on the Commercial Laws of Scotland, 1 vol. 493. Sect. (1126).
(2) 2 Campb. 301.
(3) Shuttleworth v. Bravo, 1 Str. 507.
(4) 2 Campb. 412. In re Codd, 2 Scho. & Lef. 116.
(5) Lloyd v. Stretton, 1 Starkie, 40.
(6) Green v. Jones, 2 Campb. 411.
(7) Williams v. Stevens, 2 Campb. 301. by Ld. Ellenborough.

later case, on the trial of an issue, whether a person was a trader, a creditor, who had not proved, was not allowed to support the commission, under which he might afterwards prove and receive a dividend. (1) The Lord Chancellor has also determined, that a creditor is not competent to prove an act of bankruptcy at the opening of a commission; "It is not enough, that the creditor has not availed himself of the commission; it ought to be certain that he never will, in order to render him competent." (2) And Lord Ellenborough, who had been of a different opinion in the case above cited, held afterwards in the case of Crooke v. Edwards (3), on the trial of an issue, that a creditor, who had not proved under the commission, was yet incompetent to prove an act of bankruptcy.

A creditor, who has sold his debt, or agreed to sell it, may prove the petitioning creditor's debt in support of the commission, or may give evidence to increase the fund (4); for the interest, which he once had in enlarging the funds, no longer exists.

7. Witness discharging his own debt.

In an action of trespass against a sheriff, where the question was, whether goods, which had been taken in execution in a suit against A. B., belonged to him or to the plaintiff, A. B. was not allowed to be witness for the defendant to prove the goods his property, since he would have been discharged from his debt in case of a verdict for the defendant. (5) And the Court of Common Pleas distinguished this case from that of Nix v. Cutting before-cited (6), (where in an action of trover a witness was allowed to prove the property in himself,) by saying that the verdict in that case could not be afterwards used by or against the witness, but in this case a verdict in favour of the party, by whom he was called to give evidence, would relieve him from an execution then pending against him.

(1) Adams v. Malkin, 3 Campb. 543. by Lord Ch. J. Gibbs.

(2) By the L. Chancellor. 1 Rose 302. n.

(3) 2 Starkie N. P. C. 302.

(4) Granger v. Furlong, 2 Black. Rep 1273. Heath v. Hall, 4 Taunt. 326.

(5) Bland v. Ansley, 2 New Rep. 331.

(6) See ante, p. 47.

8. Witness proving himself tenant in ejectment.

In an action of ejectment, where the plaintiff had made out a primâ facie case against the defendant as tenant in possession, the Court of Common Pleas held, that a witness, called on the part of the defendant, was not competent to prove himself the real tenant, and that the defendant was only his bailiff; for the verdict would have the effect of turning him out immediately; it was therefore an immediate interest, and outweighed the remoter effect of his subjecting himself by his testimony to an action of ejectment and trespass for mesne profits. (1)

Degree of interest.

If there is a direct interest in the event of the suit, it will make the witness incompetent, however small and inconsiderable the degree of interest may be. Thus, in an action of trespass, where the question was, whether a corporation, which had inclosed part of a common, had left a sufficiency for the commoners, a freeman was considered incompetent to prove the affirmative (2), because the rent must have been received for the use of the corporation; though it was admitted, that the amount of the rent was exceedingly small. Hence it appears, that a person who loses or gains the smallest sum by the event of a suit, whatever may be his rank, fortune, or character, is as incompetent to give evidence, as one who may be interested to the amount of thousands. This is the unavoidable consequence of the general rule. If interest is allowed

(1) Doe dem. Jones v. Wilde, 5 Taunt. 183. 1 Marshall, 7 S. C.

(2) Burton v. Hinde, 5 T. R. 174.*

* See R. v. Mayor and Commonalty of London, 2 Lev. 231., R. v. Carpenter, 2 Show. 47., and case of City of London, 1 Ventr. 351. contrà. In these cases, freemen were admitted to be witnesses on account of the minuteness of their interest, against the opinion of Jones J. The law of the case in 2 Lev. (where the point is precisely the same as in the other two cases,) has been doubted by Mr. Justice Buller; see Bull. N. P. 290. In the case of Dowdeswell v. Nott, 2 Vern. 317., the Court said, "the objection of an existing interest, though never so small, has always prevailed, and it was so resolved upon great debate in the case of the City of London concerning the water-bailiff."

to disqualify in any case, it must in all; as it is impossible by any scale to measure the different effects, which it may have on different minds.

Interest on both sides.

If the witness has an interest inclining him to each of the parties, so as upon the whole to make him indifferent, he will be competent to give evidence for either party. Thus, in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain to prove that he had received the money from the plaintiff for the defendant's use; for he stood indifferent between the parties, and, whichever way the verdict might go, he was equally answerable. (1) So, in an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and defendant admitted, had demised the premises first to the plaintiff or to a third person; A. B. was a competent witness to prove that fact; for the verdict could not be given in evidence in any future action either by or against the witness, being a record between other parties; and it appeared to be indifferent to him, whether he had the one or the other as his tenant. (2)

In an action on a bill of exchange, by the indorsee against the drawer, the acceptor is a competent witness on the part of the plaintiff, to prove that he had no effects of the drawer in his hands (3): And so is the payee, to prove that he indorsed the bill to the plaintiff, before it became due, in payment for goods; for though he would be liable to the plaintiff for the goods sold, if this action fail; yet, if it succeed, he would be liable to the defendant for money paid. (4) And in an action on a promissory note, by the payee against the maker, a joint maker of the note, who is not sued, is competent to

(1) Evans v. Williams, 7 T. R. 481. n. (*c*). Rocher v. Busher, 1 Starkie, 27. Ilderton v. Atkinson, 7 T. R. 480. Shuttleworth v. Stephens, 1 Campb. 407. Staples v. Okines, 1 Esp. N. P. C. 332.

(2) Bell v. Harwood, 3 T. R. 308. See Serle v. Serle, 2 Roll. Abr. 685. tit. Trial, (G,) cited Gilb. Ev. 109.

(3) Staples v. Okines. 1 Esp. N. P. C. 331.

(4) Shuttleworth v. Stephens, 1 Campb. 408.

prove the defendant's signature (1); for, if the plaintiff recover against the defendant, the witness would be liable to him for contribution; and, if he fail, he might resort to the defendant for the whole, and in that case the witness would be entitled to contribution from the defendant, so that in either point of view the witness stands indifferent between the parties.

Where one partner drew a bill in the partnership firm, and gave it in payment to a separate creditor in discharge of his own debt, the Court of King's Bench held, that, in an action by such creditor against the acceptor, either of the partners might be called on the part of the defendant, to prove that the partner, who drew the bill, had no authority to draw it in the name of the firm; and that the bankruptcy of the partners would not vary the question as to the competency of the witness. (2) In this case, the partner who drew the bill would have been liable to the plaintiff to the amount of his debt, if the plaintiff had failed in the action, and if the plaintiff had succeeded, he would have been liable to the defendant the acceptor; and with respect to the other partner, though he would have been liable to the defendant, if the plaintiff recovered, he would have had his remedy over against his joint partner.

And in the late case of Hudson v. Robinson (3), which was an action of assumpsit for the non-delivery of goods and for money had and received, and the defendant pleaded in abatement, that the promises were made jointly with A. and B., and not by the defendant alone, the Court of King's Bench determined, that A. was a competent witness for the plaintiff, to prove that the defendant was not authorised or employed by the partners to make the contract, and that he received the money to his own use; for, although the plaintiff should succeed, the defendant would not on that account be precluded from suing the other partners for contribution; the

(1) York v. Blott, 5 Maule & Selw. 71. Lockhart v. Graham, 1 Str. 35. S. P. in an action on a bond.

(2) Ridley v. Taylor, 13 East, 175.

(3) 4 Maule & Sel. 476. Cossham v. Goldney, 2 Starkie, N. P. C. 414. S. P.

record in this action would not operate as an estoppel against him on that occasion, because there is no mutuality, out of which the estoppel can arise: the record could only be used, as a medium of proof, to show that this defendant had paid in the action a certain sum; and, in this point of view, the verdict in favour of the plaintiff must be considered rather as prejudicial to the witness.

The Court of King's Bench held, in the case of Buckland v. Tankard, (1) that a witness, who might have a remedy by action, whether the plaintiff or defendant had a verdict, was nevertheless interested, because, under the particular circumstances, he would have a greater difficulty in the one case, than in the other, to enforce that remedy. However, this appears to be the only case, which has been decided on such a ground; and from the leading cases on this subject, which rest on the broad ground of interest, such a circumstance may now more properly be considered as having a strong influence on the witness, but not as forming any solid objection to his competency.

The objection, that the witness derives an immediate benefit or loss from the event of the suit, is an objection on the *voire dire*, and excludes him from giving any kind of evidence for the party who calls him. If the objection prevails, he cannot be examined at all. The meaning of the rule, which declares, that such an interested person shall not be a witness in courts of justice, must be, that he cannot be heard at all as a witness on the side, to which his interest inclines him. Chief Baron Gilbert lays it down, that he is totally excluded from all attestation, from his supposed want of integrity. Thus, on an indictment against a township for not repairing a highway, a person of another township in the same parish seems not to be a competent witness for the prosecution, even to prove the road to be a common highway: though it may be said, that to such an extent he charges himself, and his testimony is against his own interest. The answer to this is, that, on the

(1) 5 T. R. 579.

trial of this indictment, his evidence has not, upon the whole, that tendency; for, without the proof of that fact, the indictment cannot be sustained, and the witness by giving such evidence is supporting a prosecution, which, if it succeed, would have the effect of discharging him and the inhabitants of the other townships. So, in an action of ejectment, a witness, who admits, that he is to have a lease of the premises, in case the defendant is turned out of possession by the ejectment, is as incompetent to prove the defendant in possession of the premises, as to prove any other material fact necessary for the support of the action.

Sect. II.

Of the Rule on the Subject of Interest, considered with reference to the Parties in the Suit.

Party to suit incompetent.

A party to the suit on record cannot be witness at the trial for himself, or for a joint-suitor, against the adverse party (1), on account of the immediate and direct interest, which he has in the event, either from having a certain benefit or loss, or from being liable to costs. The party, therefore, in whose name an action is brought, cannot be a witness, though he be merely trustee for some other person (2); as, a prochein amy suing for an infant. (3) Persons appointed governors and directors of the poor of a parish, under an act of parliament, which authorises them to assess rates on the inhabitants, but in case of appeal makes them liable to costs, to be indemnified out of the parochial fund, are not competent witnesses on the trial of such appeal; as they are parties to the suit, and liable to costs individually in the first instance. (4) But there is no objection, it is said, to the competency of per-

(1) 1 Vern. 230. 1 P. Wms. 596. Gilb. Ev. 116.

(2) Bauerman v. Radenius, 7 T. R. 668. Phillipps v. Duke of Buckingham, 1 Vern. 230.

(3) Clutterbuck v. Lord Huntingtower, 1 Str. 505. James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1025. Gilb. Ev. 107.

(4) R. v. St. Mary Magdalen, Bermondsey, 3 East, 7.

sons, who are party to a suit in a corporate capacity, and consequently not individually liable to costs, and who are free from all interest in the question. Thus, in an action against the governors of the Foundling Hospital for the amount of work done by the plaintiff, Lord Kenyon admitted several of the governors to prove the badness and insufficiency of the work. (1)

Courts of Equity, in granting an issue to be tried at law, frequently direct, that a party to the suit shall be examined at the trial as a witness; such an order waves no objection, except that which arises from the circumstance of the witness being party in the cause. (2)

Exceptions.

An exception to the general rule is stated by Rolle C. J., in the case of an action against a hundred on the statute of Winton (3), where the plaintiff (the party robbed) was allowed to prove the robbery and the amount of his loss, "from necessity, on default of other proof." (4) So, in the case of Bennet v. Hundred of Hertford (5), which was an action on the same statute, brought by a carrier for a robbery committed in his absence on his servant, the court ruled, against the opinion of Rolle C. J., that the plaintiff might prove the amount of the money, which he had delivered to his servant. And the 15th section of the statute 8 G. 2. c. 16. recites, that in an action against the hundred the person robbed may prove the robbery, and the property of which he was robbed. But though the plaintiff may prove the fact of the robbery, yet with respect to matters, which may be proved by other evidence, he is not a competent witness. Thus he cannot give evidence to prove, that the place, where he was robbed, is within the hundred, against which he has brought the action. (6) And though the party robbed, who brought the

(1) Weller v. The Governors of Foundl. Hosp. Peake, N. P. C. 153. And see Barrett v. Gore and another, 3 Atk. 401.

(2) Rogerson v. Whittington, 1 Swanston, Ch. Rep. 39.

(3) St. 13 Ed. 1. c. 2.

(4) 2 Roll. Ab. 686. Bull. N. P. 289.

(5) 2 Roll. Ab. 686. Vin. Ab. Ev. (l), pl. 34.

(6) By Page J. Rep. temp. Hard. 83.

action, has been allowed to be witness even in his own cause, yet none of the inhabitants of the hundred were formerly received on behalf of the hundred, however inconsiderable their interest might be (1); but now they are competent witnesses by the statute 8 G. 2. c. 16. s. 15.

One other exception appears to be made in the case of an action for a malicious prosecution, where it seems to have been understood, that the evidence, which the defendant himself gave on the trial of the indictment, may, under certain circumstances, be received in his favour on the trial of the action. In the case of Johnson v. Browning (2), Lord Holt C. J. admitted in evidence the oath of the defendant's wife (who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be witness) to prove the felony committed; "for otherwise, it is said, one that should be robbed would be under an intolerable mischief; if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." And Mr. Justice Buller, treating of this action, says, "As it may come to be left to a jury, it is advisable for the defendant to give proof of a probable cause, if he be capable of doing it; and for this purpose proof of the evidence given by the defendant on the indictment is good." (3)

In the case of the Mayor and Commonalty of London (4), and that of the city of London concerning water-bailage (5), the point in issue was, whether the corporation was entitled to certain tolls; in the first case, it was ruled by the whole court, and by three judges in the last, that freemen (members of the corporation) might be witnesses in support of the claim, because the tolls would be received for the benefit of the whole corporate body, and the interest of any individual must there-

(1) R. v. Carpenter, 2 Show. 47.
(2) 6 Mod. Rep. 216.
(3) Bull. N. P. 14., citing Cobb. v. Car. 1746.
(4) 2 Lev. 231. And see Corp. of Sutton Coldfield v. Wilson, 1 Vern. 254.
(5) 1 Ventr. 351.

fore be inconsiderable. But Mr. Justice Buller has doubted the law of the former case (1), and its authority is still further shaken by the case of Burton v. Hinde, before mentioned. (2)

Answer of defendant in chancery.

In courts of equity, if a bill is filed for discovery only, and an issue is directed, the plaintiff goes to law, giving the defendant the benefit of his answer. (3) And it seems at one time to have been the practice to direct an issue, where a bill was filed also for relief, and the defendant's answer positively denied the facts stated in the bill, which was supported only by a single witness; and in such cases the defendant's answer was directed to be read at the trial. (4) But an issue would not now be directed, where there is merely oath against oath; for the rule in equity is, that, if the answer contains a positive denial of the case stated in the bill, and it is contradicted only by a single witness, there cannot be a decree against the defendant (5); it should seem, therefore, that in such a case the answer of the defendant cannot be directed to be read at law. And the court has refused to make an order to that effect, where the plaintiff's witness was supported by concurring circumstances. (6)

Party not compellable to give evidence.

As a party to the suit is not suffered to be witness in support of his own interest, so he is never compelled in courts of law to give evidence for the opposite party against himself. Thus, in a question of settlement between two parishes, the rated inhabitants of either parish, being in reality the parties to the proceeding, cannot be compelled by the adverse party to answer against their own interest (7), and their declarations are evidence against the parish, without first calling the inhabitants themselves to give evidence. (8) So in an action of ejectment, on the several demises of two lessors, one of them is not compellable

(1) Bull. N. P. 290.
(2) 5 T. R. 174. supra, p. 67.
(3) See 9 Ves. 282.
(4) Ibotson v. Rhodes, 2 Vern. 554. 3 Atk. 408. Gilb. Ev. 137.
(5) See infra, ch. vii. sect. 1.
(6) Only v. Walker, 3 Atk. 407.
(7) R. v. Woburn, 10 East, 405.
(8) R. v. Hardwick, 11 East, 579. R. v. Whitley Lower, 1 Maule & Sel. 636.

to give evidence for the defendant, though no title has been proved under his demise (1); the lessors of the plaintiff, said Lord Ellenborough, are substantially the parties on the record; all are jointly liable; that lessor, upon whose title the recovery proceeds, is generally the trustee of the other; and there are the same reasons for protecting them from being examined, which have produced the general rule of law, that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favour.

One co-plaintiff witness against another.

But where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, he may be admitted with the consent of the adverse party, though at the same time he defeats the claim of those, who jointly sue with him (2): for, if the plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible; and how is the proof less credible, said C. J. Mansfield, if, with the consent of the defendant, who waves all objection to his testimony, he declares the same thing upon oath at the time of the trial? And in an action of ejectment against two defendants, one of whom suffers judgment by default, he is a competent witness to prove the other in possession (3); Lord Ellenborough held, that the verdict in this case would not prevent the plaintiff from suing the witness for the mesne profits; that the only supposed interest imputable to the witness, is the possibility that the plaintiff will sue the present defendant alone; but this is such a remote interest as cannot render the witness incompetent.

Defendant, improperly joined, when a witness.

If any person, says Ch. B. Gilbert (4), be arbitrarily made a defendant to prevent his testimony in the cause, he shall not prevail by that artifice, but the defendant, against whom

(1) Fenn dem. Pewtriss v. Granger, 3 Campb. 178.

(2) Norden and another v. Williamson, 1 Taunt. 378.

(3) Doe dem. Harrop v. Green and another, 4 Esp. 198.

(4) Gilb. Ev. 117. Bull. N. P. 285.

nothing is proved, shall notwithstanding be sworn; for here the defendant does not swear in his own justification, but in justification of another, with whom he is unnecessarily joined; and if this were not allowed, the plaintiff might turn all the several witnesses into defendants, and he might be able to prove what he pleased without contest. But this rule must be understood, when there is no kind of evidence against such defendant; for if there be evidence against him, though not enough to convict him in the judge's opinion, yet such person cannot be witness for the other, but his guilt or innocence must wait the event of the verdict, the jury being judges of the fact.

In trespass against a person, " for that he, together with A. B. &c.," committed the wrong complained of, if it appear, that A. B. was concerned in the trespass and is party to the suit, (which must be by producing the original or process against him, and proving an ineffectual endeavour to arrest him, or that the process was lost,) he cannot be admitted a witness for the defendant (1); but if nothing is proved against A. B. then he ought to be admitted. (2) The following case is put by Ch. Baron Gilbert: " Trespass against A. and B. for two horses — evidence against A. as to one — and the question is, if he may be a witness for B. in relation to the other; and it seems, that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself; but if it were not the same fact, but two distinct trespasses at different times and places, arbitrarily joined in the same declaration, then they may be witnesses one for the other, because the oath of one of them has no influence on the fact laid to his charge, but merely goes in discharge of the other." (3)

Co-defendant, pleading bankruptcy, not a witness.

In an action against several defendants, if one plead his bankruptcy, and the others plead the general issue, the former

(1) Reazon v. Ewbank, Bull. N. P. 286. Hill v. Fleming, Rep. temp. Hard. 264. Lloyd v. Williams, ib. 123.

(2) Page v. Crook, Styl. 401. 1 Atk. 452.

(3) Gilb. Ev. 118.

cannot be admitted to give evidence for the rest, though he may have received his certificate (1); for, in case of a verdict for the plaintiff, he is liable to the costs of this action. And in a similar case, lately determined in the court of Common Pleas (2), the court held, that the co-defendant, who had pleaded his bankruptcy,* could not be admitted as witness for the other defendants. "The witness," said Lord Chief Justice Gibbs, "who was called to prove, that all the defendants had not entered into a joint contract with the plaintiff, has admitted such contract by his plea, and merely relied on his bankruptcy. The bankrupts stood as defendants on the record, and contended that they had a legal defence; — the plaintiffs went through their proof, and, I am not aware of any case, in which it has been laid down to be the duty of a judge to give his opinion of the legal effect of particular evidence in the middle of a cause, in order to have an opportunity of introducing other witnesses to be examined for the defendants, and still less so, to admit witnesses to disprove that which they had before admitted to be true." If a *nolle prosequi* had been entered as to the defendant, who is proposed to be called as witness, that would make him competent. (3)

Defendant, suffering judgment by default, when competent.

In a case where one of the defendants, on an indictment for an assault, submitted and was fined, and paid the fine, Pratt C. J. allowed him to be witness for another defendant, considering the trial as at an end with respect to him. (4) But on a joint indictment against several for a misdemeanor, a defendant, who suffers judgment by default, cannot be a witness for the others (5); the admission of such evidence, said Lord Ellenborough, might be extended equally to every other criminal case, and thus one of the party, by suffering judgment by default, might protect the rest; there is a community of guilt;

(1) Raven v. Dunning and another, 3 Esp. N. P. C. 25. Currie v. Child and another, 3 Camph. 283. S. P.

(2) Emmett v. Bradley and others, 1 Moore, 332.

(3) Said by Parke J. to have been so ruled by Le Blanc J. at Lancaster. See 1 Moore, 339.

(4) R. v. Fletcher, 1 Str. 633. R. v. Sherman and Idle, Rep. temp. Hard. 303.

(5) R. v. Lafone and others, 5 Esp. N. P. C. 155.

they are all engaged in an unlawful proceeding; the offence is the offence of all, not only of a single individual.

In an action on a joint contract against two defendants, where one let judgment go by default, Lord Kenyon refused to admit him, as witness for the other defendant, to negative the contract; for, if negatived as to one, it fails as to the other, and the plaintiff could not make use of the judgment by default against him (1); nor is he a competent witness for the plaintiff, for, if the plaintiff succeeds, he will be entitled to a contribution from the co-defendant, and, if the plaintiff fails, he himself will be liable to the whole of the demand. (2)

It has been held at nisi prius, in the case of Ward v. Haydon, that a defendant in an action of trover, who suffers judgment by default, may be witness *for the co-defendants*, as he is not liable to the costs of the issue tried against the other, and is not himself released, whatever may be the event of that issue. (3) But one who suffers judgment by default, is not a competent witness, in an action of trespass, *against the co-defendants.* In a case of this kind (4), Mr. Justice Le Blanc said, "the general rule is, that a party to the record is not admissible as a witness; in the case of Ward v. Haydon, the co-defendant was called to *exculpate* the other defendant, here it is proposed to call a co-defendant to *inculpate* the others; the cases therefore are distinguishable." And he added, that "when there had been an innovation in the rule, he was not disposed to extend it."

If a material witness for a defendant in ejectment is made a co-defendant, his proper course is to let judgment go by default; but, if he plead, the Court will not afterwards upon motion strike out his name. (5) "But in such case," says

(1) Brown v. Fox, Ex. Sum. Ass. 1789, MS.

(2) Brown v. Brown and another, 4 Taunt. 752.

(3) Ward v. Haydon and another, 2 Esp. N. P. C. 553.

(4) Chapman v. Graves, 2 Campb. 333. n. by Le Blanc J.

(5) Dormer v. Fortescue, Bull. N. P. 285.

Mr. Justice Buller, "if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant." (1)

Witness made defendant by mistake.

Where a witness for the plaintiff is by mistake made a defendant, the court will on motion suffer his name to be struck out of the record even after issue joined, and then he may be examined (2); or, in the case of an information, the attorney-general may enter a *nolle prosequi* as to one of the defendants, and so make him a witness. (3)

A plaintiff cannot ordinarily examine a defendant as a witness in actions of common law, though nothing be proved against him, because he is considered as having waved his testimony by making him a defendant, yet the rule is much less strict in courts of equity, where defendants, who are made parties to a suit without having any interest, are allowed to be examined either for the plaintiff, or for their co-defendants. (4)

Sect. III.

Of the Rule on the Subject of Interest, considered with reference to the Husband or Wife of the Party.

Principle of the rule.

As a party on the record is not a competent witness, so neither is the husband or wife of the party competent to give evidence either for or against the party. (5) No other relation is excluded (6); a father may give evidence for his son, or the son for his father; and though the relation between them may influence his testimony, it will not render him incompetent. The reason for excluding the husband and wife from giving evi-

(1) Bull. N. P. 285.
(2) 1 Sid. 441. Bull. N. P. 285.
(3) Rep. temp. Hard. 163. Bull. N. P. 285.
(4) Barrett v. Gore and another, 3 Atk. 401. Ambl. 393. 2 Chan. Cas. 214. 1 Ball & Beatty. 99.
(5) Co. Lit. 6. (*b.*) Hawk. b. 2. c. 46. s. 70. Gilb. Ev. 119. Bull. N. P. 286.
(6) 1 Hale, P. C. 303. 2 Hale, P.C. 276. Hawk. b. 2. c. 46. s. 76. Bull. N. P. 287. 1 Wils. 332.

dence, either for or against each other, is founded partly on their identity of interest, partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because it is contrary to the legal policy of marriage.

Husbands or wives not witnesses against each other.

First, they cannot be witnesses against each other. It has been resolved, says Lord Coke (1), that a wife cannot be produced against the husband, as it might be the means of implacable discord and dissension between them, and the means of great inconvenience. And in an action brought by a woman as feme sole, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her. (2)

The husband and wife are not allowed to be witnesses against each other in any criminal proceeding. Thus, in a prosecution for bigamy, the first husband cannot be admitted to prove the former marriage against the wife (3); such evidence would directly criminate, and therefore is not admissible for the reason above mentioned. So far the principle is clear and well defined. But the rule, as laid down in the case of the King against the Inhabitants of Cliviger, is much wider and more general (4); and as it has lately undergone the revision of the Court of King's Bench, it will be necessary shortly to state that case. On an appeal against an order of removal of a pauper, and also of a woman as his wife, the respondents having proved the marriage, the appellants called the pauper for the purpose of proving his former marriage with another woman, but he swore directly the reverse; they then called the woman to prove the alleged former marriage. The court of quarter sessions rejected the witness; and the Court of King's Bench determined, that she was not competent to give such

(1) Co. Lit. 6. b.

(2) Bentley v. Cook, cited in R. v. Cliviger, 2 T. R. 265. 269.

(3) Mary Grigg's case, Sir T. Raym. 1.

(4) 2 T. R. 263.

evidence. Both Mr. Justice Ashurst and Mr. Justice Grose, the only judges present in court, were of opinion, that a husband and wife are not permitted, from a principle of public policy, to give any evidence that may even *tend to criminate* each other; that the objection is not confined merely to cases, where they are *directly accused* of a crime; but, even in collateral cases, if their evidence *tends that way*, it shall not be admitted; for although the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended.

The authorities relied upon, in support of this decision, are a passage from Lord Hale's Pleas of the Crown (1) and the case of Broughton v. Harpur (2). But the former authority goes no further than this, that the wife is not *compellable* to give any evidence charging the husband with an offence; the passage is, " a woman is not bound to be sworn or to give evidence against another in case of theft, &c., if her husband be concerned, though it be material against another, and not directly against her husband." In the case of Broughton v. Harpur, where the plaintiff made title to lands as son and heir of A. B. and C. D. his wife, in right of C. D., and the defendant's case was, that A. B. was married to a former wife then living, Gould J. admitted the woman, to whom A. B. was supposed to be married, to prove the former marriage; but afterwards, as the report states, the same cause being tried upon the same title between the same parties, Lord Holt C. J. refused to admit the former wife, as witness, to prove that fact. The note of the case is very short; and it is not stated, for what reason the wife was considered incompetent on the second trial. The objection against her competency on the first trial was on the ground of interest; and, although at that time this cause of incompetency was not accurately defined, it is now clearly settled, that such an objection could not be supported, and that it was properly overruled on the first trial. These authorities, therefore, it is evident, do not support the case of

(1) 2 H. P. C. 301. (2) 2 Ld. Raym. 752.

the King v. Inhabitants of Cliviger, to the extent to which that case has gone; they certainly do not lead to the conclusion, that husband and wife are not permitted to give any evidence, that has *a tendency to criminate* each other.

The rule laid down in the case of the King v. Cliviger was much discussed in a very late case, the case of the King against the Inhabitants of All Saints in Worcester (1), in which the Court of King's Bench was of opinion, that it had been expressed in terms much too general and undefined. That case was as follows. On an appeal against the removal of Esther Newman, otherwise Esther Willis, to the parish of All Saints, as to her maiden settlement, the respondents called a woman of the name of Ann Willis for the purpose of proving this fact, namely, that at a certain time she married one G. Willis. The appellants objected to her competency, alleging that they were prepared to prove his marriage with the pauper at a subsequent time. The quarter sessions admitted the evidence of the witness, who proved her marriage with G. W. about fourteen years ago; and cohabitation between this witness and G. W., as man and wife, was proved by other evidence. The respondents then proved, that the pauper gained a settlement in her own right in the appellant parish, and that she had about three years ago married G. W.; and this marriage was proved as well by the pauper herself, as by a witness present at the time of the marriage. The counsel for the appellants contended, that the evidence of Ann Willis ought to be struck out. But the court of quarter sessions over-ruled the objection, and stated the case for the opinion of the Court of King's Bench. In the course of the argument, which took place on shewing cause against the rule for setting aside the judgment of the court below, the case of the King v. Cliviger was brought into discussion. And after much argument the Court of King's Bench was of opinion, in the first place, that the case cited, (admitting it to its utmost extent,) did not shew the evidence to be inadmissible at the time that it was offered; for the wife did not contradict the

(1) Easter Term, 1817, May 4. MS.

husband, as he had not been examined, — she did not by her evidence directly criminate him, as the proceeding related to other matters, and not to any criminal charge against him, — and her evidence could never be used against him, nor be made the groundwork of any future criminal proceeding; the evidence, therefore, was unobjectionable, when received, and could not properly be expunged. The Court were further of opinion, that the rule, laid down in the case of the King v. Cliviger, was too large and general; that the former wife would have been competent to prove her marriage, though the second marriage had been first proved by the respondents, and that, even if the second marriage had been proved by the appellants, still she would be competent, and the respondents in reply might have called her to prove the former marriage; for her evidence did not directly criminate the husband, and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence.

The result therefore appears to be, that, on the trial of an appeal against an order of removal, (and, upon the same principle, in any suit or proceeding between third persons,) a husband or wife is a competent witness to prove a former marriage, even after proof of a second marriage, although perhaps the witness would not be *compellable* to answer such questions. And the reasoning, upon which this rule is founded, is equally strong to shew, that the one may be called as witness to disprove what has been stated by the other; and that either the party, who has called the one, or the opposite party, may call the other for the purpose of contradicting. Indeed, the reasoning is much stronger in this case than in the former, where the husband or wife is allowed to prove the first marriage; for although they may directly contradict each other as to a particular fact, it will not follow, that either party has been guilty of perjury. And as the most serious inconveniences might result from a different rule, which would be a bar to the full and complete investigation of the subject, in cases too where the property, the character, or even the life

of a party may be at stake, it appears to be reasonable and necessary to the ends of justice, that such evidence should be admitted.

Husbands or wives not witnesses for each other.

Secondly, husbands or wives cannot be witnesses for each other. The wife of a prisoner cannot give evidence for him on his trial. And on a prosecution against several persons for a conspiracy, Lord Ellenborough C. J. refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (1)

Declarations, or letters, of husband or wife.

The same reason applies to the declarations of the husband or wife. Where an action is brought by or against the husband, or by the husband and wife jointly in right of the wife, the general rule is, that the declarations of the wife are not evidence against the husband. (2) Therefore, in an action of assumpsit brought by the husband for wages earned by his wife, her acknowledgment of having been paid by the defendant is not to be admitted against the husband. (3)* So, in an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence to affect the husband (4): nor are the declarations of the wife evidence in his favour. (5) So, letters written by the husband to the wife may be read as

(1) R. v. Locker and others, 5 Esp. C. 107.; and see R. v. Frederick and another, 2 Str. 1094. S. P.

(2) Winsmore v. Greenbank, Willes, 577. Alban and others v. Pritchett, 6 T.R. 680. Barron v. Grillard, 3 Ves. & Beam. 165. Baker v. Morley, Bull. N. P. 28.

(3) Hall v. Hill, 2 Str. 1094.

(4) Denn v. White and another, 7 T. R. 112.

(5) Hodgkinson v. Fletcher, 4 Campb. 70.

* In the case of Carey v. Adkins (*a*), (an action against an officer of the police, to recover money which he had taken from the plaintiff's wife on suspicion of her having got it unlawfully,) Lord Ellenborough admitted the account given by her, respecting the money, on her examination before a magistrate, to be given in evidence on behalf of the defendant; "the money," said Lord Ellenborough, "appears never to have been in the husband's possession, and, as the wife had the exclusive custody and management of it, he must be bound by what she said concerning it."

(*a*) 4 Campb. 94.

evidence against him; but her letters to him will not be evidence for him. (1) A discourse between the husband and wife, in the presence of a third person, may be given in evidence against the husband, like any other conversation in which he may have been concerned.

In an action for criminal conversation with the plaintiff's wife, the wife's letters to the defendant are not evidence for the defendant against the husband, nor is her confession evidence for the husband against the defendant; but conversations between her and the defendant are evidence against him (2). Evidence of the manner, in which the husband and wife used to live together, before her connection with the defendant, is clearly admissible, for the purpose either of increasing or lowering the damages: and upon this principle it has been determined, that, where the husband and wife have lived apart from each other, the letters of the wife to her husband, written before any suspicion of a criminal intercourse, are admissible in evidence, as shewing their demeanor and conduct, whether they were living on terms of mutual affection; but, on account of the obvious danger of collusion, it ought to be strictly proved, that the letters, which are offered in evidence, were written at a time, when the wife was not suspected of misconduct. (3)

In an action brought by the executrix of a surviving trustee under a marriage-settlement against a sheriff, to recover back the value of certain goods sold by him under an execution against a third person, that person was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust to the plaintiff for the separate use of his (the witness's) wife. (4) In this case, as his debt would have been discharged by a sufficient execution, his evidence would have been in that respect against

(1) Bull. N. P. 28.

(2) Bull. N. P. 28. Winsmore v. Greenbank, Willes, 577.

(3) Edwards v. Crock, 4 Esp. N. P. C. 39. Trelawney v. Coleman, 1 Barn. Ald. 90. 2 Starkie, N. P. C. 191. S. C.—The cause of their separation was not shewn in the latter case. In the former, they were living separate, as servants in different families.

(4) Davis v. Dinwoody, 4 T. R. 678.

his personal interest (1): but, on the other hand, it was the wife's interest to have the property secured for her separate use; and though the action was between third persons, yet it directly affected her interest, the action being brought by her trustee for her benefit, and the real point in issue being, whether the goods belonged to her or to her husband.

This general rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests, and of securing mutual confidence, is so strictly observed, that, even after a dissolution of marriage for adultery, the wife is not admitted to give any evidence of what occurred during the marriage, which would have been excluded, if the marriage had continued. (2) This, as Lord Ellenbourgh has said, is on the ground, that the confidence, which subsisted between them at the time, shall not be violated in consequence of any future separation. Thus one great cause of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law. In a case before Lord Hardwicke C. J., he would not suffer a woman to be a witness, though her husband consented (3); "The rule," he said, "is for the peace of families, and such consent should never be encouraged."

Exceptions to the general rule.

There are several exceptions, to which the reason of the general rule on this subject does not apply, or where it is outweighed by considerations of higher importance.

1. In prosecution on stat. 3 H. 7.

First, if a woman is taken away by force and married, she may be witness against her husband indicted on stat. 3 H. 7. c. 2., for she is not a wife *de jure*, a contract obtained by force having no obligation in law. (4) From this it should seem, that, if the actual marriage is valid, (as where the woman after the abduction consents to the marriage voluntarily, and not

(1) Bland v. Ansley, 2 New Rep. 331.

(2) Monroe v. Twislcton, cited in Aveson v. Ld. Kinnaird, 6 East, 192.

(3) Barker v. Sir Woolston Dixie, Rep. temp. Hard. 264.

(4) Swendsen's case, 5 St. Tr. 456. Bull. N. P. 286. Ramsay's case, cited Rep. temp. Hard. 83. 1 Hale, P. C. 302. 661.

induced by any precedent menace,) her evidence ought not to be allowed. (1)

Secondly, on an indictment for a second marriage during the continuance of a former marriage, though the first wife cannot be a witness (2), yet the second wife may after proof of the first marriage. (3) 2. In prosecution for bigamy.

Thirdly, a wife may be witness on the prosecution of her husband for an offence committed against her person. (4) This was determined by all the judges present on Lord Audley's trial, and has been since confirmed by the greatest authorities (5), on every principle of humanity and justice. So, in Azyre's case, on an indictment for beating his wife, Lord Raymond suffered her to give evidence. (6) A wife is permitted to exhibit articles of the peace against her husband (7); and the Court will not receive affidavits on the part of the defendant, to contradict the truth of the articles exhibited against him, and prevent his giving surety. (8) So, an affidavit of a married woman has been admitted to be read, on an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force after articles of separation (9): and it would be strange, says Mr. Justice Buller, to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (10) On the trial of a man for the murder of his wife, her dying declarations are evidence against him. (11) It has been said, indeed, that a wife may be witness against her 3. In prosecution for offences against the person.

(1) 1 Hale, P. C. 302. 4 Bl. Com. 209. contra.
(2) Mary Grigg's case, Sir T. Raym. 1. Hawk. b. 2. c. 46. s. 71.
(3) 1 Hale P. C. 393. Bull. N. P. 287. 1 East, P. C. 469.
(4) 1 St. Tr. 393. Hutton, 116.
(5) 1 Hale, P. C. 301. Hawk. b. 2. c. 46. s. 77. Probyn J. in Rep. temp. Hard. 83. Bull. N. P. 287. 1 Bl. Comm. 443. Doubted in Grigg's case, Sir T. Raym. 1. and in Gilb. Ev. 120.
(6) 1 Str. 633.; Bull. N. P. 287. S. C. Jagger's case, 1 East, P. C. 454.
(7) Bull. N. P. 287.
(8) Lord Vane's case, 2 Str. 1202. more fully stated from Mr. Ford's MS. in 13 East, 171. n. (a); R. v. Doherty, ib. S. P.
(9) Lady Lawley's case, Bull. N.P. 287. Mary Mead's case, 1 Burr. 543.
(10) Bull. N. P. 287.
(11) Woodcock's case, 2 Leach, Cr. C. 563. John's case, 1 East, P. C. 557.

husband in a case of high treason (1): but there are authorities the other way. (2)

4. When the wife is agent for the defendant, her husband.

Fourthly, where the wife has made contracts with the authority and consent of the husband, she has been considered his agent for that purpose, and her representations are evidence against the husband, who has permitted her to contract for him with third persons. (3) Thus the wife's acknowledgments, as to a debt being due for goods furnished, with her husband's consent, for her accommodation, are sufficient to take the case out of the statute of limitations. (4) And for the same reason, in an action of assumpsit by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to shew the terms of the contract. (5)

5. Examination of bankrupt's wife, before commissioners.

Fifthly, by stat. 21 J. 1. c. 19. s. 5 & 6., which recites, that doubts had arisen upon the point, it is provided, "that, after the party is declared a bankrupt, the commissioners may examine his wife on oath, for the finding out of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by such wife, in her own person, or by her act or means, or by any other person." Before this statute, the commissioners could not examine the bankrupt's wife. (6)

6. On appeal against order of bastardy.

Sixthly, upon an appeal against an order of bastardy, in the case of a married woman, Lord Hardwicke and the other Judges held, that she was a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the appeal, because such a fact, so secret in its nature, can scarce

(1) Dictum in Grigg's case, Sir T. Raym. 1. cited in Gilb. Ev. 119. and in Bull. N. P. 289.

(2) Brownlow, 47.

(3) Emerson v. Blonden, 1 Esp. N. P. C. 142. 1 Str. 527. Bull. N. P. 287.

(4) Palethorp v. Furnish, 2 Esp. N. P. C. 511. n. Gregory v. Parker, 1 Campb. 394. Anderson v. Sanderson, 1 Holt, N. P. C. 591. 2 Starkie, N. P. C. 204. S. C. See 15 Ves. 159. and see the case of Carey v. Adkins, 4 Campb. stated ante, p. 84.

(5) White v. Cuyler, 6 T. R. 176.

(6) Anon. case, 1 Brownlow, 47.

ever be proved by other evidence. (1) And by a parity of reason, said Lord Ellenborough, in the last cited case of the King v. Luffe, it should seem, if she be admitted, as a witness of necessity, to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove, that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition. But this is only from the necessity of the thing: she is not competent to prove any other fact, as want of access (2), which other witnesses may be reasonably supposed capable of proving. She cannot prove want of access even after the husband's death. (3) This rule is founded on the broad principle of public policy, independently of any possible motives of interest in the particular case. (4)

On an appeal against the removal of a woman, as the widow of A. B. deceased, primâ facie evidence of the marriage having been produced on the part of the respondents, the Court of King's Bench determined, that the woman was a competent witness, on the part of the appellants, to disprove the marriage. (5)

7. In action between third persons.

Seventhly, it has been ruled at nisi prius, that a wife may be witness, in an action between third persons not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand; as, in an action between third persons for goods sold and delivered, to prove the goods sold not on the credit of the defendant, but on her husband's credit. (6) This evidence, it may be said, was in some measure against the husband, though he was not a party in the suit. On the other hand, to reject her evidence in such a case would be a hardship on the defendant, who may have

(1) R. v. Reading, Rep. temp. Hard. 82. R. v. Bedell, Andr. 8. R. v. Luffe, 8 East, 203. Gilb. Ev. 139.

(2) Ante, (1), R. v. Rooke, 1 Wils. 340. R. v. Kea, 11 East, 132.

(3) R. v. Kea, 11 East, 132.

(4) 11 East, 132. 8 East, 203.

(5) R. v. Bramley, 6 T. R. 330.; R. v. St. Peter's, Burr. Sett. Cas. 25. S. P.

(6) Williams v. Johnson, by King C. J. 1 Str. 504. Bull. N. P. 287. S. C.

no other means of defending himself against an unjust demand: and though upon her testimony the defendant might have a verdict, and an action might afterwards in consequence be brought against the husband, she would not then be admitted as witness, nor could her evidence in the first suit be produced against him.

In an action of trover by a carrier for a box, which had been delivered to the defendant by mistake, the plaintiff called the owner's wife to prove what the box contained, but Holt C. J. refused to hear her testimony, on the ground that the verdict in that action, with oath of what the carrier's witness swore, might be given in evidence to prove the value of the goods in a subsequent action brought by the husband against the carrier. (1) But it seems questionable, how the verdict in this cause could be afterwards used as evidence by the husband; and the husband appears not to be immediately interested in the event of the carrier's action; for whether the plaintiff succeed or fail, he would be equally liable to the owner of the goods.

Evidence of a woman, living with the party as wife.

In the case of Campbell v. Twemlow (2), which came before the Court of Exchequer on a motion to set aside an award, one of the grounds of the application was, that the arbitrator had rejected the evidence of a woman called on the part of the plaintiff, who had cohabited with him for several years and passed as his wife, but who would have stated, that she had never been married to him. The point was much argued at the bar. The Court, considering it a doubtful question, (as the report states,) declined giving any opinion, as it was unnecessary for the determination of the case; and they refused the motion, on the ground, that the opinion of the arbitrator was final and conclusive (3), all matters both of law and fact having been left to his decision. Mr. Baron Richards cited a case, before Lord Kenyon on the Chester circuit in

(1) Tiley v. Cowling, Ld. Raym. 744. Bull. N.P. 243. In the case of Davit v. Dinwoody, before cited p. 85., the action was between third parties; but there the plaintiff sued for the benefit of the wife, though the husband was not a party to the suit.

(2) 1 Price, 81.

(3) Upon this point, see 6 Ves. 282. 9 Ves. 364. 14 Ves. 271. in note. 1 Swanston, 55.

the year 1782, where, on a trial for forgery, the prisoner called a woman as his witness, whom he had himself in Court represented to be his wife, but afterwards, on hearing an objection taken to her competency, denied that she was married to him, and Lord Kenyon would not permit him to call her, after having represented her as his wife.

Sect. IV.

Of the Effect of Admissions by a Party to the Suit, or by his Agent, against the Party's Interest.

As the parties to a suit are excluded from being witnesses on account of their interest, statements or representations made by them against their interest must be evidence against them; and in many cases they will be the strongest evidence. Upon this principle, the free admissions of one of the parties to a suit on the matter in issue, and the voluntary confession of a prisoner under a criminal charge, are always received in evidence against the party.

First, with respect to admissions.

Admissions of a party to a suit.

The admissions of a party to the suit against his interest are evidence in favour of the other side, whether made by the real party on record, or by a nominal party who sues as a trustee for the benefit of another (1), or whether by the party who is really interested in the suit though not named on the record. (2) The following examples will illustrate the several parts of this rule.

In the case of Bauerman and another v. Radenius, (3) which was an action by the shippers of goods against the captain of a ship, for not delivering the goods in proper condition, a letter written by the plaintiffs was given in evidence on the part of the defendant, in which they entirely exculpated the defendant from all misconduct; and it appeared

(1) Bauerman v. Radenius, 7 T. R. 664. Craib v. D'Aeth, ib. 670. n.

(2) R. v. Hardwick, 11 East, 578. 589.

(3) 7 T. R 664.

also from the letter, that the goods were shipped on the risk of third persons, and that the plaintiffs were not really interested in the suit: the counsel on the other side contended, that the parties really interested ought not to be concluded by the admission of the plaintiffs, who were merely nominal parties in the action: Lord Kenyon was of a different opinion, and the plaintiffs were nonsuited. The Court of King's Bench afterwards affirmed the nonsuit. Mr. Justice Lawrence on that occasion said, "Van Dyck and Co, the persons on whose risk the goods were shipped, are in this difficulty: the present plaintiffs either have or have not an interest; but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them, that they have no cause of action, is admissible evidence. I have looked into the books, to see if I could find any case in which it has been holden, that the admission of a plaintiff on the record is not evidence, but have found none." *

Admissions by a party to the suit are evidence, whether made before or after the commencement of the action, whether in writing or by parol. The recital of a fact in the counterpart of an indenture is evidence against the party, by whom the deed is executed. (1) So a grant to a corporation by a certain name is evidence against those claiming under the grantor, that the corporation was at the time known by that name. (2) Answers in chancery are evidence in trials at law, against the party that made them (3); and very strong evidence, as they are delivered in upon oath. So, the examination of a bankrupt before the commissioners is evidence against him, although the questions may have been improperly put to him with a

(1) Burleigh v. Stibbs, 5 T. R. 465. See infra, as to recitals.

(2) Mayor, &c. of Carlisle v. Blamire, 8 East, 493.

(3) Bull. N. P. 237. Doe dem. Digby v. Steel, 3 Campb. 115.

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* In the Nisi Prius case of Davies v. Ridge and others, 3 Esp. N. P. C. 101., which was an action by a judgment-creditor of P. P., on an award, and

view to the action (1), and though he might have demurred to them as subjecting him to penalties. (2)

In an action of debt upon a bond conditioned to pay money to L. D., for whose benefit the action was brought, the defendant proved, that L. D. had said in a conversation about this bond, that the defendant owed nothing; upon which the jury found for the defendant: on a motion for a new trial, it was argued, that the declarations of L. D., who was no party to the action, ought not to affect the plaintiff, and affidavits were offered to explain L. D.'s evidence; but the Court said, that the affidavits were inadmissible, and that it was to be considered, as if L. D. was the plaintiff, the action being for L. D.'s benefit. (3) And in an appeal against the removal of a pauper, declarations by a rated inhabitant of either parish, concerning the facts in issue, are admissible in evidence, (without calling him as witness,) not only against himself, but also against the other rated inhabitants of his parish (4): for they are the parties really interested, although the appeal may be entered in the names of the parish officers; and they are not compellable as parties to give evidence of the fact. (5)

Admissions of persons substantially interested, tho' not technically parties.

Upon the same principle, declarations by the petitioning creditor (who was also assignee under a commission of

(1) Stockfleth v. De Tastet, 4 Campb. 10.

(2) Smith v. Beadnell, 1 Campb. 30.

(3) Hanson v. Parker, 1 Wils. 257. Devis v. Dinwoody, supra. p. 85.

(4) R. v. Hardwick. 11 East, 578. R. v. Whitley Lower, 1 Maule & Selw. 636.

(5) 11 East, 589. R. v. Woburn, 10 East, 395.

for money received by the defendants as trustees of P. P., Lord Eldon is reported to have ruled, that admissions by one of the trustees, of his having money of the trust-estate in his hands, were not binding upon the others, the defendants being only trustees, and not all personally liable. And in an action by the Corporation of London v. Long, 1 Campb. 22., where the question related to the powers of a city-officer, Lord Ellenborough is said to have held, that the declarations of an indifferent individual of the corporation were not admissible, but that he would admit what the officer himself had been heard to say upon the subject. The general principle is that laid down by Mr. Justice Lawrence in the case cited in the text; and it does no appear from the reports, upon what specific ground these Nisi Prius cases are to be considered as exceptions.

bankruptcy), are admissible in an action against a sheriff, the assignees having given instructions for the defence, and thus appearing to be the real parties to the action. (1) So, in an action by the master of a ship for freight, the declarations of the owner of the ship are admissible against the plaintiff, as the action is brought for the owner's benefit. (2)

An action upon a policy may be brought in the name of the person who effected it, though he be not the person actually interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are received as admissible in evidence against the plaintiff, and what would be a defence against them is in many instances a defence against the plaintiff. (3)

Declarations of a guardian.

The declarations of a guardian are not admissible in evidence against a minor, who sues by his guardian. (4) And the infant's answer in chancery by his guardian cannot be read as evidence against the infant (5); it is not in reality the answer of the infant, but of the guardian; for the guardian only is sworn; and the guardian has authority to sue for the infant's benefit, not for his prejudice. We have before seen, that the guardian is not himself competent to give evidence, being liable to the costs of the suit (6); and for this reason, in one case, his declarations were improperly admitted. (7)

Declaration by a partner of the party.

It may be inferred from a former part of this section, that, in a civil suit against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him to the suit. (8) In an action of covenant, therefore, against two defendants, the affidavit of one of them may be given in

(1) Dowden v. Fowle, 4 Campb. 38. Young v. Smith, 6 Esp. 121.

(2) Smith v. Lyon, 3 Campb. 465.

(3) By Ld. Ellenborough, in Bell v. Ansley, 16 East, 143.

(4) Cowling v. Ely, 2 Starkie, N. P. C. 366. by Abbott C. J.

(5) By the opinion of all the judges of K. B. and C. P. in Eccleston v. Petty, Carth. 79. Gilb. Ev. 44. 3 P. Will. 237. n. [E.]

(6) See ante, p. 59.

(7) James v. Hatfield, 1 Str. 547.

(8) 11 East, 589.

evidence against both. (1) So, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners, that the goods, to which the agreement related, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract. (2) And an admission by one defendant of his partnership with the co-defendants, who were sued with him as acceptors of a bill of exchange, and who had been outlawed, has been received as proof against him of a joint promise by all. (3)

The rule has even been extended in actions so far, as to admit the declarations of one partner to be evidence against another, concerning joint contracts and their joint interest, although the person, who has made such declarations, is not a party to the suit: as, where, in an action by a creditor against some of the partnership firm, the answer of another partner to a bill filed by other creditors was received in evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those, who are as one person with him in interest. (4) And the admission of a partner, though not a party to the suit, is evidence as to joint contracts against any other partner, as well after the determination of the partnership as during its continuance. (5) *

Declarations by co-trespassers.

This is the rule respecting admissions in the case of joint contracts, or where several persons have one and the same interest in the subject matter. But the same rule cannot be applied to actions of trespass or to criminal proceedings. In an action of trespass against several defendants, an admission by one of the defendants is not evidence against the others to

(1) Vicary's case, Gilb. Ev. 51.

(2) Lucas and others v. De la Cour, 1 Maule & Sel. 249.

(3) Sangster v. Mazarredo and others, 1 Starkie, 161.

(4) Grant v. Jackson, Peake, N. P. C. 203. Wood and others v. Braddick, 1 Taunt. 104. Nichols v. Dowding and Kemp, 1 Starkie, 81. (The point was doubted in Thwaites v. Richardson, Peake, N. P. C. 16.)

(5) Wood and others v. Braddick, 1 Taunt. 104.

* The cases of Whitcomb v. Whiting, 2 Doug. 652. and Jackson v. Fairbank, 2 H. Black. 340. may here be referred to, as shewing the effect of an acknowledgment by one of several drawers of a promissory note, in an action brought against the other drawer.

prove the fact of their being co-trespassers; and, even where that fact is fully established, it seems very doubtful, whether any admissions or declarations made by one of the defendants, as to the joint motives or designs of the party, can be received as evidence against the others, except so far as they accompany the act, and may be considered as forming a part of the transaction. The rule has in one case been laid down incidentally with greater latitude, and it has been said (1), that, although an admission by one of several defendants in trespass will not establish the others to be co-trespassers, yet, "if that is proved by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object." Perhaps, on consideration, it may appear, that the rule is to be understood with some limitation; and from analogy to the principle established by the greatest authorities in cases of conspiracy, the true limitation of the rule appears to be this, that such declarations only are admissible, as have been made with reference to the concerted plan, and in pursuance of the common object; and that declarations which have not been made with reference to that object, and are not strictly a part of the transaction in question, cannot be admitted as evidence against co-trespassers.

Acts and declarations of co-conspirators.

In prosecutions for conspiracies, it is an established rule, that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, as well as in sound reason, the act of the whole party; and therefore the proof of such act will be evidence against any of the others, who were engaged in the same general conspiracy, without regard to the question, whether the prisoner is proved to have been concerned in that particular transaction. This kind of evidence was received on the trial of Lord Stafford and of Lord Lovat, on the trials for high treason at the Old Baily in 1794, and in the case of Stone in 1796; in which last case the rule was completely settled. In

(1) By Lord Ellenborough, R. v. Hardwick, 11 East, 585

that case (1), evidence having been given, sufficient for the jury to consider, whether the prisoner was engaged in a conspiracy for treasonable purposes, it was determined, that a letter, written by one of the conspirators in pursuance of the common design, (although the letter had not been traced into the hands of the prisoner, or to his knowledge,) was admissible in evidence, as the act of the prisoner himself. The acts of the several conspirators, who are engaged with the prisoner in one common object, are evidence against him, though he may not have been directly a party to them; they are evidence, as acts connected with, and in conformity with, his own acts.

The same rule, subject to the same limitations, must apply to the declarations of conspirators, as well as to their acts. Any declarations made by one of the party, in pursuance of the common object of the conspiracy, are evidence against the rest of the party, who are as much responsible for all that has been said or done by their associates in carrying into effect the concerted plan, as if it had been pronounced by their own voice or executed by their own hand. These declarations are of the nature of acts; they are, in reality, acts done by the party; and generally they are far more mischievous than acts, which consist only in corporal agency. All consultations, therefore, carried on by one conspirator, relative to the general design, and all conversations in his presence, are evidence against another conspirator, though absent. What the effect of such evidence will be, as the Ch. J. Eyre observed, on the discussion of a question of this kind in Hardy's trial (2), must depend on a variety of circumstances, such as, whether he was attending to the conversation, whether he approved or disapproved: but still such conversations are admissible in evidence.

What one of the party may have said, not in furtherance of the plot, but as a mere relation of some past transaction, or as to the share which some of the others have had in

(1) R. v. Stone, 6 T. R. 527. 1 East, P. C. 97, 98. Hardy's Trial, 24. Howell's St. Tr. 437. 451. 700. Horne Tooke's Trial, vol. 25. 127. 243. Stone's case, Ib. 1268—1276. 1311.

(2) Vol. 24. Howell's Coll. St. Tr. 704.

the execution of the common design, cannot, it is conceived, be admitted in evidence to affect other persons. On the trial of Hardy, for high-treason (1), a question arose as to the admissibility of a letter written by Thelwall, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer of the letter were proved to be members; the argument in favour of the evidence was, that the letter was an act done in furtherance of the conspiracy; the objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the court decided against the admissibility of the letter. The Lord Ch. Justice Eyre, the Lord Chief Baron Macdonald, and Mr. Baron Hotham were of opinion, that the letter could not be received. Mr. Justice Buller (with whom Mr. Justice Grose agreed, in thinking it admissible,) said, the letter ought to be received in evidence, for the purpose of shewing what was the nature and extent of the conspiracy; that, in Damaree's and Purchase's cases, evidence was received of what some of the parties had done, when the prisoner was not there; that, on the trial of Lord Southampton, something said by Lord Essex, previous to the prisoner's being there, was admitted as evidence; that, in Lord George Gordon's case, evidence of what different persons of the mob had said, though he was not there, had been admitted. But the Lord Ch. Justice Eyre, and the other judges, considered the letter, not as an act done in prosecution of the plot, but as a mere narrative of what had passed. "Correspondence," said the Ch. Justice, "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing." And with respect to the cases alluded to by Mr. Justice Buller, the Ch. Justice

(1) Howell's St. Tr. vol. 24. 452, 475.

observed, "In the cases of Damaree, and Lord George Gordon, the cry of the mob at the time made a part of the fact, part of the transaction, and therefore such evidence might properly be received."

Another question arose in the same trial (1), on the admissibility of a letter written by one of the conspirators to another person in a distant part of the kingdom, who was also proved to be a party in the same conspiracy. This was a letter written by the chairman of a meeting in London, to a delegate sent by that meeting into Scotland, though not received by him: it was stated to contain encouragement to him to proceed in the cause, in which he was engaged by the direction of the meeting in London, and that meeting was proved to have been composed, among others, of the prisoner, the writer of the letter, and the person to whom it was addressed. All the judges held the letter to be admissible, excepting the Lord Chief Justice Eyre, who thought it could not be admitted against the prisoner, as it had not been received by the person to whom it was written, and might perhaps never have gone out of the writer's hands. But the other judges were of opinion, that the letter, being addressed by one conspirator to another conspirator, and having relation to the conspiracy, (not merely a bare description to a stranger, as in the case before mentioned,) this was a complete act in that single conspirator, and the letter, therefore, ought to be read against the prisoner, as shewing the nature and tendency of the conspiracy, though the letter should be intercepted, and though it should never reach the person for whose perusal it was intended.

In the late trial of Watson (2), some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator before the apprehension of the prisoner, and which had a reference to the design of the conspiracy, and were in furtherance of the plot, were held to be admissible evidence against the prisoner; all the judges were of opinion, that these papers ought to be received, there being

(1) P. 453—477. Martin's Letter to Margarot. (2) 2 Starkie, 140.

in this case strong presumptive evidence, that they were in the house of the co-conspirator before the prisoner's apprehension, and in the same state, in which they were afterwards found; and that this circumstance very materially distinguished the present case from Hardy's case, (cited by the prisoner's counsel,) where the papers were found after the prisoner's apprehension in the possession of persons, who possibly might not have obtained the papers till afterwards; whereas, in the present case, the room, in which the papers were found, had been locked up by one of the conspirators.

A question also arose, in the same case (1), as to the admissibility of another paper, found among those before mentioned, which contained written questions and answers of a description calculated to excite mutiny in the army; one objection to this evidence was, that such a written paper could not be admitted, as there had been no proof of its ever having been printed or proposed to be printed, or that any attempt had been made to circulate it; and Sidney's case was cited as an authority. But the judges held, that the case then before them was clearly distinguishable from Sidney's case; and Mr. Justice Abbot particularly stated, that the paper, in that case, was not only an unpublished paper, but appeared to have been composed several years before the crime was supposed to have been committed, and that the true objection was, not that the paper was unpublished, but that it had no reference to the treasonable practices charged in the indictment. The paper, produced in Watson's case, was afterwards withdrawn by the Attorney-General, on account of some doubt expressed by the court, whether it had been clearly proved, that the paper in question was intended to have been used in furtherance of the common purpose.

The statement of an agent.

The statement or representation of an agent in making an agreement, or in doing an act within the scope of his authority, is evidence against the principal himself, and equivalent to

(5) 2 Starkie, 141.

his own acknowledgment (1): for what the agent says may be explanatory of the agreement, or determine the quality of the act which it accompanies, and must therefore be as binding on the principal, as the act or agreement itself. To prove such a representation, the opposite party is not obliged to call the agent, but may establish it by other evidence. Thus, what an agent says at the time of a sale, which he is employed to make, is evidence as part of the transaction of selling; but the principal is not bound by a representation of the agent at another time. (2)

In the case of Biggs v. Laurence (3), which was an action for goods sold and delivered, Mr. Justice Buller admitted a written paper, by which the defendant's agent acknowledged the receipt of the goods, as evidence against the principal; and on that evidence the plaintiff recovered. However, it was on one occasion stated by counsel in argument (4), that Lord Kenyon since that case had frequently ruled the contrary, without its ever having been questioned: and this statement seems to have been acquiesced in by Lord Kenyon (5), who said, "that was not the point, upon which the case was afterwards argued or determined, on the motion for a new trial," meaning the point, that such a receipt could be admitted in evidence. It does not appear from the case of Biggs v. Laurence, whether the agent's acknowledgment, of having received the goods, was made at the time of delivery, or on what other occasion: though, upon this fact, according to the cases above cited, particularly the case of Fairlie v. Hastings, in which the subject was fully discussed by the Master of the Rolls, the admissibility of such evidence may be found materially to depend.

In one case indeed (6), Lord Kenyon C. J. is said to have refused to admit an agent's letter as evidence of an agreement

(1) See the judgment by the Master of the Rolls in Fairlie v. Hastings, 10 Ves. 127.

(2) Helyar v. Hawke, 5 Esp. N. P. C. 74. Peto v. Hague, 5 Esp. N. P. C. 135. Alexander v. Gibson, 2 Camph. 555. Palethorp v. Furnish, 2 Esp. N. P. C. 511. n.

(3) 3 T. R. 454.

(4) Bauerman v. Radenius, 7 T. R. 665.

(5) See 10 Ves. 128.

(6) Maesters v. Abraham, 1 Esp. N. P. C. 375.

against the principal, holding, that the agent himself ought to be examined. "If the agreement," said the Master of the Rolls (1), adverting to this case, "was contained in the letter, I should have thought it sufficient, to prove that the letter was written by the agent: but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." And the Court of Common Pleas lately decided, after much argument, in the cases of Kahl v. Jansen (2), and Langhorn v. Allnut (3), that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent. The general rule on the subject was there fully recognised and confirmed. "When it is proved," said the Chief Justice, "that A. is agent of B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract, which he makes for B., and which therefore binds him, but it is not admissible as the agent's account of what passes." (4) Such declarations are admitted in evidence, not for the purpose of establishing the truth of the fact stated, but as representations, by which the principal is as much bound as if he made them himself, and which are equally binding, whether the fact stated be true or false.

If one party refers another, for information on a disputed fact, to a third person as authorised to answer for him (5), or employs an agent to make certain propositions respecting a transaction between himself and another (6), he is bound by what his agent says or does, within the scope of his authority, as much as if it had been done or said by himself. Thus, for example, in an action for goods sold and delivered, where it appeared at the trial, that in a conversation between the plaintiff and defendant, the former asserted that he had delivered

(1) 10 Ves. 127.
(2) 4 Taunt. 565.
(3) 4 Taunt. 511. and Reyner v. Pearson, 4 Taunt. 663. S. P.
(4) 4 Taunt. 519.
(5) Daniel v. Pitt, 1 Campb. 366. Lloyd v. Willan, 1 Esp. N. P. C. 178.
(6) Gainsford v. Grammar, 2 Campb. 9.

the goods by one C., and the defendant replied, "If C. will say, he did deliver the goods, I will pay for them," the plaintiff was allowed to give in evidence C.'s answer respecting the matter referred to him. (1) In the case of Fabrigas v. Mostyn, a point arose, which may serve as another example to illustrate the rule here laid down. (2) There, a witness, who had been employed by the defendant, to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer: the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff: or whether the interpreter himself ought to be called, as the witness understood neither the questions put to the plaintiff, nor the answer made by him. But Mr. Justice Gould ruled that the evidence of the witness was clearly admissible, and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency.

It must be remembered, that the cases, in which the declarations of an agent have been admitted against the principal, are exceptions to that general rule, which requires evidence to be given upon oath: and the exception is confined to such statements, as are made by him, either at the time of his making an agreement about which he is employed, or in acting within the scope of his authority. "Except in one or the other of these ways, said the Master of the Rolls in Fairlie v. Hastings (3), I do not see how they can be evidence against the principal:" and therefore in that case, (where the fact, sought to be established, was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of,) he refused to admit, as evidence of this fact, the declaration of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on

(1) Daniell v. Pitt, 1 Campb. 366.; 6 Esp. N. P. C. 74. S. C. Williams v. Innes, 1 Campb. 364. Brock v. Kent, do. n. 366. Burt v. Palmer, 5 Esp. N. P. C. 145.

(2) 11 St. Tr. 171.

(3) 10 Ves. 128.

its being demanded by the plaintiff, informed him, that it had been delivered to the defendant. (1) "The admission of an agent, (continued the Master of the Rolls,) cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing, that any person may have asserted, as to his conduct or agreement, merely because that person has been an agent. If any fact, material to the interest of either party, rests in the knowledge of an agent, the general rule is, that it ought to be proved by his testimony, not by his mere assertion."

Proof of agency.

The fact of the agency must be first established, before the declarations of a supposed agent can be received. For this purpose, the admissions of the principal are evidence against himself; or the fact may be proved directly by the agent. In the case of Johnson v. Ward (2), an action on a policy of insurance, the affidavit of a person, stating that he subscribed the policy on behalf of the defendant, (which affidavit the defendant himself had previously used, on a motion to put off the trial,) was, under the particular circumstances, properly admitted as proof of the agency. The defendant, having used the affidavit for such a purpose, must be considered as having known and adopted its contents. But the single circumstance, that the affidavit purports to have been made by a person as agent, would not be sufficient proof of his being invested with that authority.

If the action is brought upon a deed, or if a deed is given in evidence in support of the defendant's plea, and the deed has been executed under a power of attorney, the power must be proved; as, where the defendant, in an action of replevin, made cognizance under A. B. for rent-arrear, and a lease executed by the wife of A. B., as attorney to her husband, was

(1) Fairlie v. Hastings, 10 Ves. 139.; Wilson v. Turner, 1 Taunt. 128.; Young v. Wright, 1 Campb. 398.

(2) 6 Esp. N. P. C. 48.

given in evidence, Lord Kenyon held; that she could not be examined as to the lease, until the power of attorney was produced. (1)

A letter written by a clerk, whose business it is to write in the name of his employer, will have precisely the same effect, as if written by the principal himself. (2) Proof that a person has acted as agent in other instances, in which the principal has recognised his acts, will be sufficient evidence of a general authority; as, where one had subscribed several policies, besides the one in question, in the defendant's name, which had been afterwards recognised by him. (3) So, where the defendant's son had in three or four instances signed bills of exchange for his father, this was held to be sufficient *primâ facie* evidence, in an action upon a guarantee purporting to be in the father's name, of an authority to the son to sign the guarantee. (4) In the two last cited cases, it must be presumed, as a very sensible writer has observed (5), that the acts of the agent in such other instances, as were given in evidence for the purpose of shewing a general authority, were proved to have been recognised by the principal. Such previous proof appears to be indispensably necessary; and, therefore, in the case of Courteen v. Touse (6), where a witness proved that he had often seen the supposed agent sign policies for the defendant, but had never seen any general power of attorney for that purpose, and was not acquainted with any instance in which the defendant had paid a loss upon such a policy, Lord Ellenborough held, that this was not sufficient proof of agency.

(1) Johnson v. Mason, 1 Esp. N. P. C. 88.

(2) Harding v. Carter, Park, Ins. 4. A letter from the defendant's clerk, informing the plaintiff, that a policy had been effected, was, in this case, held to be good evidence of the existence of the policy; and the defendant was not allowed to prove that the letter had been written by mistake, and that the policy had not been made.

(3) Neal v. Erving, 1 Esp. N. P. C. 61.

(4) Watkins v. Vince, 2 Starkie, 368.

(5) Paley on Principal and Agent, 201.

(6) 1 Campb. 43. n.

Proof by a witness, that he has acted for many years as the bailiff of A. B. for a certain manor, and during that time made returns to mandates directed to A. B. as lord of the manor, will be sufficient evidence of his being bailiff, though he may never have seen A. B.; and the fact of A. B. being lord of the manor will be proved by the sheriff's mandate to him as such, together with the bailiff's return. (1)

Admission by party's attorney.

The attorney of one of the parties, who has made an admission with intent to obviate the necessity of proving the fact, must be supposed to have an authority for that purpose, and his client will be bound by the admission (2); as, where he has given a formal admission of the execution of a deed, or of the dishonour of a bill: but what the attorney may happen to state in the course of conversation is clearly not evidence in the cause. And propositions, made by an attorney on the part of his client, (whether before or after the commencement of a suit,) respecting a demand, which another person had against him, may be used as evidence against the client. (3) These propositions, though they cannot be proved by the attorney, from a regard to the privilege of the client, yet, if proved by another witness, are received as the admission of an accredited agent; and proof, that they were made by the attorney on the record, will be sufficient to establish his agency. (4)

Declaration by under-sheriff and sheriff's officer.

The declarations and statements of an under-sheriff have been thought admissible in evidence against the sheriff, on the ground of his being the sheriff's general agent. (5) But a distinction is to be made between statements by an under sheriff, and statements by a bailiff or sheriff's officer. The bailiff is not the high sheriff's general deputy for all official purposes;

(1) Tyler v. D. of Leeds, 2 Starkie, 218.

(2) Young v. Wright, 1 Campb. 141. An admission, by the defendant's attorney, of the hand-writing of a person attesting a deed, is an admission of the execution by the defendant; Milward v. Temple, 1 Campb. 375. Goldie v. Shuttleworth, 1 Campb. 70.

(3) Gainsford v. Grammar, Campb. 9.

(4) S. C., and see Marshall v. Cliff, 4 Campb. 133.

(5) Yabsley v. Doble, 1 Ld. Raym. 190. 7 Term. Rep. 117.

when a warrant is granted, he becomes the special officer of the sheriff. (1) The statements of a bailiff, therefore, are admissible as evidence against a sheriff, only so far as they form a part of the transaction, in which he represents the sheriff, and for which the sheriff is responsible. (2)

The statement by the sheriff's officer is not admissible, unless the relation between the officer and the sheriff, in the particular transaction, has been clearly proved by other independent evidence. A copy of the warrant produced by the officer, under which he professed to act by the sheriff's order, is not sufficient (3); nor is the bond of indemnity, given by him, any proof of his acting under the authority of the sheriff on a particular occasion, for the bailiff is not his general officer; he gives a bond to execute such warrants as shall be directed to him; and when he receives a warrant directed to him, he becomes the sheriff's special officer. (3)

The authority from the sheriff is best proved by the warrant itself, usually kept in the custody of the officer; if he has returned it to the sheriff's office, a notice to produce it should be regularly served, and secondary evidence of the warrant will then be admitted. Or, instead of proving the warrant, if it can be shewn that the sheriff has recognised the bailiff, who executed the writ, as the officer, whom he had intrusted with the execution, such a recognition is evidence of the bailiff's acting under his authority; as, where a paper was produced from the sheriff's office, containing as well an order to the officer to give the necessary instructions for making a return to the writ in question, as also his return, this was held to be a clear recognition by the sheriff of his having authorised the officer to execute the writ. (4) But to connect a sheriff with the acts of a particular officer in the execution of a writ, it is not sufficient to prove that the officer's name appears on the writ returned, though it should appear to be the practice

(1) 7 T. R. 117.
(2) North v. Miles, 1 Campb. 389. Bowsher v. Cally, 1 Campb. 391.
(3) Drake v. Sykes, 7 T. R. 113.
(4) Jones v. Wood, 3 Campb. 228. Martin v. Bell, 1 Starkie, 415.

in the sheriff's office to indorse upon the writ the name of the officer, who executed the warrant. (1)

Effect of admission.

An acknowledgment of a debt may be frequently implied from the conduct and demeanor of a person, no less than from an express admission; and the forbearance and non-interference of one party, with full knowledge of adverse acts done by another party, is a circumstance to shew his acquiescence. (2) An admission may sometimes be inferred from what has been said in the presence and hearing of a person without his opposing or contradicting.

The force and effect of an admission must of course depend upon the circumstances, under which it has been made. In many cases it will be evidence of the strongest kind, if clearly proved: in some, it amounts to little. A full and free admission of a debt is, unless satisfactorily explained, conclusive against the party who makes it.

Proof, that a defendant, in his examination before commissioners of bankrupt, has proved his debt under the commission, is not evidence against him of such a petitioning creditor's debt, as will support the commission; much less is it evidence against a co-defendant, in an action by the assignees. (3) By proving a debt, the party at most only gives credit to the petitioning creditor and to the commissioners, that the former has not sued out the commission, nor the latter declared the party bankrupt, without proper grounds. The creditors have not the means of knowing the evidence, on which the party was declared bankrupt; and it would not be reasonable, that by proving their debts they

(1) Jones v. Wood, 3 Campb. 229. Martin v. Bell, 1 Starkie, 415. Hill v. Sheriff of Middlesex, 7 Taunt. 8. 1 Holt, N. P. C. 217. S. C. Morgan v. Brydges, 2 Starkie, 314. See Blatch v. Archer, Cowp. 65., M'Neil v. Perchard, 1 Esp. N. P. C. 263.

(2) See the following examples: Jarrett v. Leonard, 2 Maule & Selw. 265. Morris v. Burdett, 1 Campb. 218. Doe dem. Sheppard v. Allen, 3 Taunt. 78. Maltby v. Christie, 1 Esp. N. P. C. 341., cit. 16 East, 193. and stated in another part of this treatise. Doe d. Winkley v. Pye, 1 Esp. N. P. C. 364. Rankin v. Horner, cited post.

(3) Rankin v. Horner and Lauday, 16 East, 191.

should be put to the dilemma of being barred by a certificate, or of being understood to have admitted, that every act necessary to support the commission really existed, when they had not the means of judging, whether such acts did or did not exist. (1)

An admission by the defendant, that he owes a certain sum of money to the plaintiff, is strong evidence against him, in an action to recover the debt, but it will not be conclusive: the defendant, if he can, may prove the fact of payment, or shew a receipt, or give other evidence to repel the presumption arising from his acknowledgment. A receipt for money is not conclusive against the person, who has signed it; but he may shew, if he can, that the money has not been received. (2) A bill delivered by an attorney to his client, for business done during a certain period, is strong presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of his having transacted other business for the defendant. (3)

Notice to quit, served on a tenant, and not objected to.

A notice to quit at a certain time is primâ facie evidence, that the tenancy commenced at that period, if the notice was served personally on the tenant, and if he made no objection to the time of quitting mentioned in the notice. (4) The circumstance of his not making such an objection has been considered as primâ facie evidence of an admission and acquiescence. If, on the other hand, it should be made to appear, that at the time of the service the tenant did not look at the notice so as to know its contents, such evidence would completely repel the supposition of any acquiescence on the part of the tenant; for he cannot be supposed to admit a fact, of which he does not appear to have been informed. In the case

(1) Rankin v. Horner and Lauday, 16 East, 192.

(2) Stratton v. Rastall, 2 T. R. 366.

(3) Loveridge v. Botham, 1 Bos. & Pull. 49.

(4) Doe dem. Clarges v. Forster, 13 East, 405. Doe dem. Leicester v. Biggs, 2 Taunt. 109. Doe d. Baker v. Woombwell, 2 Campb. 559. Thomas d. Jones v. Thomas, do. 647.

of Thomas dem. Jones v. Thomas, the Court of King's Bench said, "whether the personal service, and silence of the tenant in possession, amount to an admission must depend upon circumstances. If he cannot read, or does not read the notice in the presence of the person who serves it upon him, it must go for nothing. In the present case, we must suppose, that the defendant read the notice and understood its contents, and that the person, who served it, stayed so long, that the defendant might have objected to it in his presence, but made no objection. These circumstances, we think, amount to primâ facie evidence of the commencement of the tenancy."

Offer by way of compromise.

An offer to pay money by way of compromise, and to get rid of an action, is not evidence of a debt (1): in such cases the point to be considered is, what the view and intention of the party was in making the offer, whether to buy peace, or from a conviction of the justice of the demand against him. "Thus if A sue B for 100l., and B offer to pay him 20l., it shall not be received in evidence; for this neither admits nor ascertains any debt, and is no more than saying he would give 20l. to get rid of the action. But if an account consists of ten articles, and B. admits that a particular one is due, it is good evidence for so much." (2) Admissions of particular articles before an arbitrator are also evidence under the same limitation, that is, when they are made, not with a view to a compromise, but while the parties are contesting their rights. (3)

A distinction, however, is to be made, between an admission of some fact connected with the merits of the cause, and an admission of an indifferent fact, as of the handwriting of a party. Thus, on the trial of an action, which had been once withdrawn under a treaty between the parties, Lord Kenyon allowed proof of the defendant's having admitted his acceptance on a bill of exchange, though the admission

(1) Bull. N. P. [236.] Gregory v. Howard, 3 Esp. N. P. C. 113.

(2) Bull. N. P. [236.]

(3) Bull. N. P. Ib. 1 P. Wms. 497. Slack v. Buchanan, Peake, N. P. C. 5. Admissions by a party before an arbitrator may be proved by the arbitrator, Gregory v. Howard, 3 Esp. N. P. C. 113.

had been made during the treaty (1); he admitted, that any admission by the party, respecting the subject matter of the action, pending a treaty on the faith of which it was made, could not be received to his prejudice; but added, that such a fact as that of the party's handwriting, not being connected with the merits of the cause, and capable of being easily proved, stood on different grounds, and that an admission of this fact might be received.

Whole of admission together.

It is scarcely necessary to observe, that the whole of an admission must be taken together, in order to shew distinctly the full meaning and sense of the party. Thus, if a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shewn, before the statement can be used as evidence against the party. (2) Or, if a person says, "that he did owe a debt, but that he had paid it," such an admission will not be received as evidence to prove the debt, without being also evidence of the payment. (3) What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however it is reasonable, that if any part of his statement is admitted in evidence, the whole should be admitted. (4)

Sect. V.

Of the Admissibility of the Confession of a Prisoner against himself.

Voluntary confession.

Since an admission is evidence against a party in civil suits, with much stronger reason is the voluntary confession of a

(1) Waldridge v. Kennison, 1 Esp. N.P.C. 143.

(2) See Jacob v. Lindsay, 1 East, 462. Smith v. Young, 1 Campb. 439. Lord Barrymore v. Taylor, 1 Esp. N.P.C. 325. Collet v. Ld. Keith, 4 Esp. N.P.C. 212. Randle v. Blackburn, 5 Taunt. 245.

(3) Anonym. case, cited 12 Vin. Abr. (A. b. 23.)

(4) See also Green v. Dunn, 3 Campb. 215. Smith v. Young, 1 Campb. 439.

prisoner evidence against him on a criminal prosecution: for it is not to be conceived, that a man would be induced to make a free confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true.

The general rule on this subject was very fully considered in a judgment delivered by Mr. Justice Grose, on a case reserved for the opinion of the twelve judges (1); and it seems to be now clearly established, that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not, in short, that any voluntary confession, made by a prisoner to any person at any time or place, is strong evidence against him; and, if satisfactorily proved, sufficient to convict without any corroborating circumstance. (2) The confession, however, must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise: for however slight the promise or threat may have been, a confession, so obtained, cannot be received in evidence (3), on account of the uncertainty and doubt, whether it was not made rather from a motive of fear or of interest than from a sense of guilt.

Voluntary confessions before magistrates have been in some cases objected to, on account of some promise of favour having been made to the prisoner before he was taken into the presence of the magistrate. In a case of this kind, mentioned by Mr. East (4), where hopes of favour had been given, and the prisoner refused before the magistrate to confess except upon conditions,

(1) Lambe's case, 2 Leach, Cr. C. 625. Hawk. P.C. b. 2. c. 46. s. 31. Thomas's case, 2 Leach, 728.

(2) Wheeling's case, cor. Ld. Kenyon C. J. 1 Leach, Cr. C. 349. n. (a).

(3) Thompson's case, 1 Leach, Cr. C. 327. Cass's case, n. (a), ib. 328. Warwickshall's case, 1 Leach, Cr. C. 299. 2 East, P. C. 568. A confession made by the prisoner, on receiving a promise to admit him a witness for the crown, is clearly not admissible. 2 Leach, 636. note in Lambe's case.

(4) 2 East, P. C. 658.

Mr. Justice Buller observed, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account, and it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession could be given in evidence. In another case, tried before Mr. Justice Bayley (1), where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate was held to be clearly admissible. In a third case, which may be mentioned on this subject (2), where the counsel for the prisoner objected to the admissibility of a confession made before the committing magistrate, and offered to prove, that the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, Mr. Baron Wood overruled the objection, and admitted the confession. The effect of an antecedent promise of favour, in rendering a confession before a magistrate inadmissible, must depend upon the nature of the promise, the time and circumstances in which it was made, and on the situation of the person from whom the promise came. A promise held out by the prosecutor, recently before the examination, or by the constable who had the prisoner in custody, may be supposed to have great influence. On the other hand, a promise made some time before, by some indifferent person, who interfered officiously without any kind of authority, and promised without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess.

Examination unsigned.

In Lambe's case (3), before mentioned, the question for the opinion of the judges was, whether a written examination,

(1) R. v. Lingate, Derby Lent Ass. 1815.

(2) R. v. Hardwick, Nottingham Lent Ass. 1811.

(3) 2 Leach, Cr. C. 625. Thomas's case, ib. 727. S. P.

taken by a committing magistrate, and containing a confession, which the prisoner, on hearing it read over to him, admitted to be true, but refused to sign, ought to have been received in evidence, as it was not signed either by the magistrate or by the prisoner; and a majority of the judges held, that such a confession would have been evidence at common law, and that it is not rendered inadmissible by any provision in the statutes of Philip and Mary respecting examinations and informations before justices of the peace. If a prisoner's confession, even when not reduced into writing, be evidence against him, *a fortiori* it must be admissible, when taken down in writing; for, the fact confessed, being thus rendered less doubtful, is of course entitled to greater credit; and it would be absurd to say, that an instrument is invalidated by a circumstance, which gives it additional strength and authenticity. (1)

Parol Evidence of confession before Magistrates.

Parol evidence of the prisoner's statement before the magistrate ought not to be received, until it is clearly shewn not to have been reduced into writing (2); for the statute of Philip and Mary, after directing the magistrate to take the examination of the prisoner, as well as of those who bring him, expressly enjoins him to put it in writing. And the propriety of committing the examination to writing, instead of leaving it to the ill-recording memory of surrounding witnesses, cannot be too strongly impressed on all who are entrusted with such judicial powers.

Examination, without oath.

The informations against the prisoner before a magistrate are to be taken on oath; the account given by the prisoner ought to be taken without oath. (3) If the prisoner has been sworn, his statement cannot be received; and if the written deposition of a prisoner purports to have been taken on oath, evidence is not admissible for the purpose of shewing, that in

(1) See Mr. J. Grose's judgment in Lambe's case, 2 Leach, Cr. C. 629.
(2) Jacob's case, 1 Leach, Cr. C. 348. Fearshire's case, ib. 240.
(3) Bull. N. P. 242. Hawk. P. C. b. 2. c. 46. s. 37. Kelyng, 2.

point of fact he was not sworn. (1) A prisoner, when taken on suspicion before a magistrate, is to be allowed to speak voluntarily, and give his free account; and he ought not to be examined or questioned by the magistrate like a common witness: in one case, where he was so examined, his account was held not to be admissible, though nothing like a threat or promise had been used. (2)

Whole of confession together.

Whenever a confession is given in evidence, the whole of what has been confessed must be taken together (3): but if only the material parts of the confessions are taken down in writing, and they are afterwards read over in the presence of the prisoner, and admitted by him to be true, that admission will make them evidence. (4) The statute of Philip and Mary requires the Justice to take the examination, *or so much thereof as is material.*

The confession of a prisoner is not to be taken in parts, but the whole together; that what is given in evidence may be neither more nor less than the prisoner intended. If the confession is not in writing, the whole of what the prisoner said must be fully stated, although it may happen, that some part of it concerns other prisoners who are tried on the same indictment: in such a case it is not possible to make any selection; for, until the evidence has been heard, it cannot be known what it is, or to whom it relates; and all that can be done is to direct the jury not to take into their consideration such parts as affect the other prisoners. But a distinction might perhaps be made in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is

(1) R. v. Smith and Hornage, 1 Starkie, 242, by Le Blanc J.

(2) R. v. Wilson, 1 Holt, 597. by Lord C. B. Richards. In the case of R. v. Merceron, before Abbott J. 2 Starkie, 366. a statement by the defendant before a Committee of the House of Commons was offered in evidence; the objection was, that the statement had been made under a compulsory process, and under the pain of incurring punishment as for a contempt, and could not therefore be considered voluntary; but the objection was overruled, and the evidence received.

(3) Hawk. ib. s. 42. R. v. Paine, 5 Mod. 165.

(4) Lambe's case, 2 Leach, Cr. C. 265. Milward v. Forbes, 4 Esp. N. P. C. 171. R. v. Smith, 1 Holt, N. P. C. 614.

capable of being separated and detached from the rest, and can be omitted without affecting in any degree the prisoner's narrative against himself.

Confession evidence only against the prisoner.

The confession is evidence only against the person confessing, not against others, although they are proved to be his accomplices. It was resolved by all the judges in the case of Tong and others (1), on an indictment for high treason, that a confession by one of the prisoners was evidence only against the party himself who made the confession, and could not be made use of as evidence against any others, whom on his examination he confessed to be in the treason.

Discoveries in consequence of confessions.

It has been determined by the opinion of all the judges, that, although confessions, improperly obtained, are not admissible, yet that any facts, which have been brought to light in consequence of such confessions, may be properly received in evidence. Thus, where a prisoner was charged, as accessary after the fact, with having received property knowing it to be stolen, proof was admitted of the property being found concealed in the prisoner's lodgings, although the knowledge of that fact had been gained from an inadmissible confession. (2) Some indeed have thought, that the circumstance of the fact being known in consequence of information received from the prisoner, ought not to be shewn at the trial. But a different practice appears to be established by later authorities; and, on a prosecution for receiving stolen goods, evidence has been admitted, that the prisoner described the place where the goods were concealed, and that afterwards they had been found there; but that part of the confession, in which he acknowledged that he himself had concealed them, was rejected, as it was improperly drawn from him. (3) There is good reason for this distinction; for, what the prisoner has said respecting the concealment of the property is ascertained

(1) Kelyng, 18., res. 5. Gilb. Ev. 124.

(2) Warwickshall's case, 1 Leach, Cr. C. 300. Mosey's case, ib. n. (a), 301. Lockhart's case, ib. 430. 2 East, P. C. 658. S. C.

(3) Grant's case, and Hodge's case, 2. East, P. C. 658. 1 Leach, Cr. C. 301. n. (a), S. C.

to be true by the fact of the subsequent discovery, but the other part of the confession, in which he charges himself with having concealed it, may have been made untruly and entirely under the influence of the threat or promise.

Confession in case of treason.

There has been some difference of opinion, respecting the sufficiency of this kind of evidence in trials for high treason. The stat. of the 7th W. 3. c. 3. s. 2. enacts, "that no person shall be indicted, tried, or attainted, for high treason or misprision of high treason, but upon the oaths and testimony of two witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason, unless the party indicted and arraigned shall willingly without violence in open court confess the same." Mr. Justice Foster seems to have been of opinion (1), that the legislature intended by this section to require two witnesses to the overt acts in all cases, except where the prisoner confessed the treason upon his arraignment in open court, and that to warrant a conviction there must be proof of the overt acts upon oath, not merely proof of the confession of the overt acts. "But," he adds (2), "perhaps it may now be too late to controvert the authority of the opinion in 1716, in Francia's case, warranted as it hath been by later precedents." (3) The rule is now clearly settled. All the judges, on a conference preparatory to the trial of Francia (4), held, that a confession of the overt acts, if proved by two witnesses, is proper evidence to be left to a jury. The same construction of the statute was adopted in Greg's case (5), by six judges against two: in Berwick's case (6), by Ld. C. J. Willes and Sir Thomas Abney against the opinion of Mr. Justice Foster; and by the judges in the commission, on the trial of the rebels in 1746. (7)

If the overt act of high treason, alleged in the indictment,

(1) See Fost. Disc. 232. 240. 243. Willis's case, ib. 242. 8 St. Tr. 254, 255. S. C. Smith's case, Fost. 240. 243.
(2) Fost. Disc. 243.
(3) See Fost. Disc. 11. n.
(4) Francia's case, 1716. Mr. J. Burnet's MS. 1 East, P. C. 133. Kelyng, 18.
(5) Greg's case, 1 East, P. C. 134.
(6) Fost. Disc. 10.
(7) Fost. Disc. p. 11. n. (†). 1 East, P. C. 134.

is the assassination of the king, or any direct attempt against his life or his person, it is plain from the provision of the stat. 39 & 40 G. 3. c. 93. (which enacts, that in such cases the prisoner shall be tried according to the same order of trial and upon the like evidence, as if he stood charged with murder,) that a confession proved by a single witness will be sufficient to convict the prisoner. And the overt acts themselves may be proved by a single witness.(1) In these cases, the rule of the common law is restored.

In all cases of high treason, when the prisoner's confession is offered in evidence as confirmatory of the testimony of the witnesses, it is clearly admissible, though proved by a single witness.(2) And with regard to all facts merely collateral, which do not conduce to the proof of the overt acts, it may be laid down as a general rule, that whatever was evidence of them at common law is still good evidence under the statute of William.(3). A confession, therefore, of such collateral facts is still admissible in evidence, though proved by a single witness.

From the above-cited cases, it appears now to be an established rule, that a full and voluntary confession by the prisoner of the overt acts charged against him, if proved by two witnesses, is of itself sufficient evidence to warrant a conviction. And, although Mr. Justice Foster suggests (4), that " the rule, for admitting a confession against the prisoner, ought not to extend further than to a confession made during the solemnity of an examination before a magistrate, or before some person having authority to take it, when the party may be presumed to be properly upon his guard and apprised of its danger," no distinction of this kind is to be found in the authorities before mentioned, On the contrary, in Francia's case the judges resolved, that the confession would be evidence, whether made before a magistrate, or in the course of convers-

(1) See infrà, ch. 7. sect. 1.

(2) Willis's case, 8 St. Tr. 254. and see Crossfield's case, 26. Howell's Coll. St. Tr. 56, 57.

(3) Fost. Disc. 242.

(4) Fost. Disc. 243. 4 Blac. Com. 356.

ation. (1) And there appears to be no solid ground for such a distinction; as confessions are admissible in trials for high treason, precisely on the same principle, which made them evidence at common law. The observations of Mr. Justice Foster relate to the effect rather than to the admissibility of this sort of evidence, and are equally applicable to confessions in any other criminal case. "Hasty confessions, he says (2), made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured: words are often mis-reported (whether through ignorance, inattention, or malice — it mattereth not to the defendant — he is equally affected in either case): they are extremely liable to misconstruction: and withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."

Sect. VI.

Of the Competency of the Party injured, as Witness in Criminal Prosecutions.

It is a general rule, that in criminal prosecutions the injured party may be a witness: although on the conviction of the prisoner he will in many cases be entitled to a reward.*

(1) See Burnet J. MS. cited 1 East, P. C. 113., and Kelyng, 19.

(2) Fost. Disc. 243.

* A note was inserted in the former editions of this work, mentioning the several acts of parliament which contain provisions respecting the granting of certificates or pecuniary rewards on the conviction of offenders. Many of these provisions have been repealed by the statute 58 G. 3. c. 70. This statute recites, as a fact found by experience, that the rewards which have been given, have not produced the effect intended in checking crimes, and that the hope or expectation of obtaining such rewards has instigated evil-disposed persons to conspire to entrap the unwary and ignorant into the commission of offences, for which they have afterwards been apprehended and prosecuted to conviction by such conspirators; whereby encouragement has not only been given to the commission of such offences, but the laws of God and man have been violently transgressed. The statute, therefore, repeals all provisions of this kind in the following acts of parliament: st.

It is the constant practice, on an indictment for robbery, to admit the evidence of the person who has been robbed; and it is not a sufficient objection, that he will be entitled to the restitution of his property, on the conviction of the offender. The same evidence is admitted in prosecutions for a cheat (1), or for perjury (2); and, in the case of perjury, it is not material, whether he has, or has not, satisfied the judgment in the suit, in which the perjury was committed. It was, indeed, at one time thought an indispensable requisite to shew the judgment satisfied (3); on the supposition, that, in case of his procuring a conviction, he might use it for the purpose of obtaining relief in equity against the judgment. But as it is now an established rule, that a court of equity will not grant relief on a conviction, which proceeds on the evidence of the prosecutor (4), there can be no objection to his being admitted a witness. And in other cases, the party aggrieved will be allowed to give evidence on a criminal prosecution, as he cannot afterwards avail himself of the record of conviction in any future suit, in order to prove the criminal act. (5) For this reason, it is conceived, on an indictment for perjury, the party injured may be a witness, whether the prosecution is by the common law, or founded on the stat. 5 Eliz. c. 9., which gives him half the forfeiture incurred; for, if, in an action to recover

(1) Parris's case, 1 Vent. 49. 2 Sid. 431. S. C. R. v. Macartney, 1 Salk. 286.

(2) R. v. Broughton, 2 Stra. 1230. R. v. Boston, 4 East, 581., R. v. Ellis, 2 Str. 1104., R. v. Nunez, 2 Str., 1042., R. v. Whiting, 1 Salk. 283. contra. But Lord Mansfield, in Abraham q. t. v. Bunn, 4 Burr. 2255. cites the case of R. v. Broughton as overruling the three last-mentioned cases.

(3) R. v. Eden, 1 Esp. N. P. C. 97. R. v. Dalby, Peake, N. P. C. 12.

(4) Bartlet v. Pickersgill, cited in Abraham v. Bunn, 4 Burr. 2255. by Lord Mansfield C. J., and in R. v. Boston, 4 East, 577. by Lord Ellenborough.

(5) Bartlet v. Pickersgill, 4 East, 577. n. (*b*). R. v. Boston, 4 East, 581. Smith v. Rummens, 1 Campb. 9. Hathaway v. Barrow, 1 Campb. 151. Burdon v. Browning, 1 Taunt. 520.

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4 W. & M. c. 8. s. 2.; st. 6, 7 W. 3. c. 17. s. 9.; st. 5 Ann. c. 31. s. 1.; st. 14 G. 2. c. 6. s. 2.; st. 15 G. 2. c. 28. s. 7. The power of granting rewards by st. 6 G. 1. for apprehending and prosecuting to conviction prisoners charged with taking rewards for helping to stolen goods without prosecuting the felon, and by st. 9 G. 2. c. 35. s. 11. for apprehending and convicting smugglers who oppose custom-house and excise officers by force of arms, and by st. 9 G. 1. c. 22. s. 12 for apprehending and convicting for the offences there mentioned, is still unrepealed.

his moiety, he would be precluded from giving the conviction in evidence, the objection against his competency seems to be removed.*

Exception in case of forgery.

An exception to this general rule has been made in the case of a prosecution for forgery, in which the party, by whom an instrument purports to be made, is not admitted to prove it forged, if he would either be liable to be sued upon the instrument (supposing it genuine), or be thereby deprived of a legal claim against another. (1) And it seems to be the prevailing opinion, that his incompetency is not confined to the single point of falsifying the hand-writing, but that he is equally incompetent to prove any other fact, which contributes to the proof of the forgery, or, in other words, any fact conducive to the general conclusion. This subject was much discussed in a late case (2), where, on a prosecution for forging a promissory note, (on which there was an endorsement in the prisoner's hand-writing, that a year's interest had been paid,) one of the points reserved was, whether the person, by whom the note purported to be made, ought to have been permitted to prove that he had never paid any interest on the note, as was pretended by the indorsement. This evidence was received on the trial, the fact of the forgery having been first proved; but, according to the report, it seems to have been generally understood that the majority of the judges considered the evidence inadmissible.† When, however, the fact

(1) Watts's case, Hard. 331. 3 Salk 172. S. C. Rhodes's case, 2 Str. 728. 1 Leach, Cr. C. 29. S. C. Russell's case, 1 Leach, 10. Caffy's case, 2 East, P. C. 995. Taylor's case, 1 Leach, 255. Crocker's case, 2 New Rep. 87.

(2) Crocker's case, Salisb. Ass. 1805, cor. Le Blanc J., 2 New Rep. 87. 90. R. v. Bunting, 2 East, P. C. 996.

* Ruled contra in an old case; Bacon's case, 2 Roll. Abr. 687.; Bull. N.P. 289. S. C. Gilb. Ev. 111. S. C.

† Lord Ellenborough C. J., the Chief Baron Macdonald, Mr. Justice Lawrence, and Mr. Justice Le Blanc, thought the witness admissible, because it had been sufficiently proved before, that the note was not signed by him; and they thought him admissible to all points except that of the forgery. Some of the other judges seemed to think, that to points perfectly collateral he would have been admissible, but they considered the point, to which he was called, as contributing to prove the forgery. MS.

is merely collateral, and does not in any way contribute to the proof of the forgery, as, where a witness is called to prove himself the person, whom the prisoner intended to personate or describe, in such a case his testimony has been admitted. (1)

If the witness would not incur any loss, nor be liable to a suit, whatever may be the result of the prosecution, his evidence ought to be received. Thus, on an indictment for forging a bank-note, in the name of a cashier of the bank of England "for the governor and company," the cashier, not being chargeable, may be a witness. (2) And on a prosecution for forging an acceptance to a bill of exchange, where the banker had paid the bill, but suspecting a forgery had not debited the person whose name was forged, this person was admitted to give evidence. (3) So, in Wells's case (4), where the prisoner was tried for forging a receipt, the person, whose name the receipt purported to bear, having before recovered the money from the prisoner, was admitted to prove the forgery. The payee of a bill of exchange, who was employed to pay the produce in discharge of a debt owing from the drawer, but had not received the bill, is competent to prove the forgery of his name. (5) And the maker of a note, which purports to be payable on demand at his own place of residence or at a banker's, but has not been paid at either place, is competent to prove that he did not make it payable at the banker's. (6)

Reason of the rule.

Upon what principle, it may be asked, is a party, by whom an instrument purports to be made, incompetent to prove it forged? In Watt's case (7), on an information for the forgery of a deed purporting to be the revocation of a will, it was

(1) Parr's case. 2 Leach, Cr. C. 487. 491. 2 East, P. C. 997. S. C.

(2) Newland's case, 1 Leach, Cr.C. 350.

(3) Usher's case, 1 Leach, Cr. C. 57.

(4) Bull. N. P. 289. 2 East, P. C. 1000. S. C.

(5) Sponsonby's case, 1 Leach, Cr. C. 374.

(6) Treble's case, 2 Taunt. 328.

(7) Watt's case, 3 Salk. 172., more fully reported in Hardr. 331. See 4 Burr. 2254., where Lord Mansfield says, that this and other cases of the same kind "were not considered or looked into."

adjudged by the barons of the exchequer, after a conference with the judges of the King's Bench, that no legatee named in the will, nor any other person who is a loser by the deed, or who may receive any advantage from the verdict, can be a witness for the prosecution: and a distinction was made between the case of an indictment for a battery, (where, it was admitted, the person beaten may be a witness, because he can reap no benefit by the verdict in another suit,) and the cases of forgery, perjury, or usury, in which, it was said, the party aggrieved may have an advantage by the verdict, and therefore shall not be received as a witness. It is, however, now an established rule, that on a prosecution for perjury (1) the party aggrieved is competent: and, that a person who has borrowed money on an usurious transaction, is also a competent witness for the plaintiff in an action for penalties against the lender (2); for he gains nothing by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. The case of forgery, therefore, stands by itself, and is considered an anomaly in the law of evidence. (3)

The reason, assigned in Watt's case, is, that the witness would receive a benefit from the verdict; and it has been suggested (4), that he is interested to procure a conviction, on the ground that a conviction would have the effect of inducing a forfeiture, and thus defeat every legal claim or security, which the prisoner might have upon the instrument. On the other hand, it may be said, if the party, by whom the instrument purports to be made, were admitted a witness, he would not be allowed afterwards to produce the record of conviction in a civil suit for the purpose of proving the supposed forfeiture, because the parties in the action would not be the same as in the prosecution, but principally, because the conviction must have pro-

(1) See ante, p. 46.
(2) Abraham q. t. v. Bunn, 4 Burr. 2251. Smith v. Prager, 7 T. R. 60. See ante, p. 49.
(3) See 4 East, 582.
(4) 2 East, P. C. 994.

ceeded partly upon his own testimony. (1) And if he would be precluded from using the record of conviction against the prisoner, and might therefore be admitted to give evidence on the trial consistently with the general rule; still less reason is there for excluding him in those cases, where the instrument purports to be made for the benefit of a third person, or where it has since become a third person's property, in either of which cases it would not be liable to forfeiture. With regard to any probable advantage, which the witness may be supposed to receive from a conviction, (whether by the practice of impounding forged instruments, or by the prisoner's being disabled from giving evidence in any future suit, or from the great probability of his failing in an action in consequence of the discredit which a conviction must throw upon the instrument (2), these are circumstances, which a jury would be directed to consider as forming a strong bias on the witness's mind, but which cannot render him incompetent.

Sect. VII.

Of certain Exceptions to the general Rule on the Subject of Interest.

It has been before stated as a general rule, that all persons, who gain or lose directly by the event of a cause, are incompetent to give evidence. There are, however, several exceptions to this general rule: some, by act of parliament, as, where informers and the inhabitants of parishes or other districts are admitted; others, from necessity or a principle of public policy, as, where evidence is received from persons who are entitled to rewards on convictions, or from agents, factors, or servants. Objections on the ground of interest proceed upon the supposition of too great a bias in the mind of the witness, and on the public utility of rejecting partial

(1) See ante, p. 48., 120., and part 2. ch. 2. sect. 5.

(2) See 2 East, P. C. 994.

testimony. The presumption of bias may be taken off, by shewing that the witness has as great or greater interest the other way, or that he has given it up; and the presumption of public utility may be answered, by shewing that it would be very inconvenient, under the particular circumstances, not to receive such testimony. (1)

First, as to the evidence of informers;

By the common law, informers, who are entitled under penal statutes to part of a penalty, are not competent witnesses. (2) But by the particular provisions or policy of several acts of parliament they may be admitted. Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed, says Ch. B. Gilbert; for the statute must not be rendered ineffectual by the impossibility of proof. (3) Thus, by stat. 2 G. 2. c. 24. s. 8. against bribery at elections, the legislature, in giving an indemnity and discharge to any person offending against the act, who shall discover any other offender so that he may be committed, must also have intended, that he should be competent to give evidence at the trial; and, therefore, in an action for penalties he has been admitted. (4) So, in a prosecution on stat. 21 G. 3. c. 37. against exporting machinery, the informer is competent. (5) So, on a prosecution for penalties under stat. 9 Ann. c. 14. s. 5., the loser of money at cards may prove his loss. (6) And, on a prosecution under stat. 23 G. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty. (7) There is no express

Informers.

(1) By Lord Mansfield, 1 Burr. 422.

(2) R. v. Tilly, 1 Stra. 315. R. v. Stone, 2 Ld. Raym. 1545. R. v. Piercy, Andr. 18. R. v. Blaney, Andr. 240. 3 Burr. 1473. 4 East, 181.

(3) Gilb. Ev. 114.

(4) Bush v. Ralling, Say. 289. Mead v. Robinson, Willes, 425. Heward. v. Shipley, 4 East, 182.

(5) R. v. Teasdale, 3 Esp. N. P. C. 68.

(6) R. v. Luckup, Willes, 425. (c)

(7) R. v. Johnson, Willes, 425. n. (c).

provision in either of the three acts of parliament last-mentioned, for admitting the evidence of the party interested. In the act of the 32 G. 3. c. 56. for preventing counterfeited certificates of servants' characters, there is a clause to that effect (1); and a similar provision is made by the act which regulates hackney coaches, stat. 33 G. 3. c. 75. s. 17.

Inhabitants of counties, parishes, &c.

Secondly, on an indictment against private persons or corporate bodies for not repairing a public bridge or the highway adjoining, the inhabitants of the county, town, riding, &c. in which the bridge is situated, are competent witnesses in support of the prosecution, by the 1st Ann. stat. 1. c. 18. s. 13. Even before this statute, such evidence had been thought admissible from necessity. (2)

In an action against a hundred by a party who has been robbed, the inhabitants of the hundred may be witnesses for the defendants, by stat. 8 G. 2. c. 16. s. 15. Before this act passed, they were not competent, because any one of them would have been liable to pay the debt, in case of judgment against the hundred. (3) The party robbed, though clearly interested, is yet competent to prove the robbery and the extent of his loss. (4)

In all cases relative to the execution of the highway act, the surveyor of the parish or place is a competent witness, though part of his salary may arise from forfeitures and penalties inflicted under the act. (5) And, on trials of offences against the same act, the inhabitants of the parish or place are also competent. (6) The inhabitants of a parish are not competent to give evidence for the defendants, on the trial of an indictment for not repairing a highway. (7)

(1) Sect. 7.

(2) R. v. Carpenter, 2 Show. 47.; and see 1 Ventr. 351. Gilb. Ev. 113.

(3) R. v. Carpenter, 2 Show. 4 . 2 Hale, P. C. 280. R. v. Kirdford, 2 East, 561.

(4) See ante, p. 72.

(5) Stat. 13 G. 3. c. 78. s. 69.

(6) Sect. 77., and stat. 30 G. 2. c. 22. s. 14.

(7) 1 Barn. & Ald. 66. 15 East, 474.

Where pecuniary penalties are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, the inhabitants are rendered competent witnesses on the trial of the offender, by stat. 27 G. 3. c. 29., provided the penalty, inflicted by the act of parliament, does not exceed twenty pounds. (1)

It has been lately provided by stat. 54 G. 3. c. 170. s. 9., that no inhabitant of any district, parish, &c., who is rated, or who is maintained by the rates, or who holds any office in the district, shall be deemed on such account an incompetent witness, for or against such district, parish, &c., in any matter relating to such rates, or relating to the boundary between such district and any adjoining district, or to any order of removal to or from such district, or to the settlement of any pauper in such district, or touching any bastards chargeable or likely to become chargeable to such district, or touching the recovery of any sum for the charges or maintenance of such bastard, or the election or appointment of any officer, or the allowance of the account of any officer of such district.

Thirdly, persons entitled to rewards on the conviction of offenders, whether the rewards are given by act of parliament, by proclamation, or by private persons, and persons entitled to the restitution of their property on the conviction of a thief (2), are competent to give evidence. (3)

Persons entitled to rewards.

Freemen are sometimes admitted as witnesses from necessity, when they would otherwise be objectionable. A case of this kind is mentioned by Mr. Justice Buller. (4) "The question being, whether the defendants had a right to be freemen, an alderman was permitted to prove that they were not freemen, because none but aldermen were privy to the transaction of the corporation in making persons free; although it appeared, that there were commons belonging to the freemen."

Freemen.

(1) R. v. Davis, 6 T. R. 177.

(2) By st. 21 H. 8. c. 11.

(3) Rudd's case, Leach, Cr. C. 157, 158. Ib. 353. n. Hawk. P. C. b. 2. c. 46. s. 135.

(4) R. v. Phipps and Archer, Bull. N. P. 289.

Agents, servants, &c.

Fourthly, it is the constant practice to admit agents to be witnesses for their principals, in order to prove contracts made by them on the part of the principal, although they may have an interest in supporting the contract; and this is allowed from necessity, or rather for the sake of trade and the common usage of business. Thus, a factor may prove a sale, though he is to receive a poundage on its amount (1), or what he has bargained for beyond a stated sum. (2) And every person, who makes a contract for another, is an agent within the meaning of this rule. (3) So, where the question was on the custom of a manor, whether a fine was due to the lord during his minority on the tenants' admission, the steward of the manor was allowed to give evidence for the lord, though it was objected to him, that he would be entitled to a fee on admission, which he would lose, if the tenant were not admitted. (4) But though agents and brokers are competent to prove a sale or contract, they are not competent to prove the contract properly executed, in an action against the principal for their misconduct or negligence; thus in an action against the defendant, for purchasing goods of an inferior quality, Lord Ch. J. Gibbs rejected, as an incompetent witness, the broker of the defendant, who was called to prove that he had purchased goods of the best quality. (5)

On the same principle of convenience, it is the common practice to admit servants, carriers, and agents, without a release, to prove the payment or receipt of money, or the delivery of goods on behalf of their master or principal, though their evidence tend to discharge themselves. (6) Thus, if money has been over-paid by a servant, or paid by mistake, he is a competent witness, in an action to recover it back. (7) But

(1) Dixon v. Cooper, 3 Wils. 40. 1 Atk. 248.
(2) Benjamin v. Porteus, 2 H. Bl. 590. R. v. Phipps, Bull. N. P. 289.
(3) 2 H. Blac. 591.
(4) Champian v. Atkinson, 3 Keb. 90. Rep. temp. Hard. 360.
(5) Gevers v. Mainwaring, 1 Holt, 139., and see ante, p. 54.
(6) By Holt C. J. in Theobald v. Tregott, 11 Mod. 262. Bull. N. P. 289. 4 T. R. 589, 590. Matthews v. Haydon, 2 Esp. N. P. C. 509. Spencer v. Golding, Peake, N. P. C. 129. Adams v. Davis, 3 Esp. N. P. C. 48.
(7) Martin v. Howel, 1 Stra. 647. Barker v. Macrae, 3 Campb. 144.

where a person has entered into a contract for the purchase of goods in his own name, it has been held that he is not a competent witness, in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant. (1) If the agent is equally liable to either party, and indifferent in point of interest, whichever way the verdict may be, he is clearly a competent witness on the general principle. (2)

The practice of admitting servants without a release, to prove a delivery of goods, or the payment of money, and the like, is for public convenience, "for the sake of trade and the common usage of business." (3) This sufficiently explains the principle, and at the same time shews the restrictions, to which the practice is subject. Where the act of the servant has been out of the ordinary course of his employment, and a mere breach of duty, the principle does not apply: and it has therefore been ruled at Nisi Prius, that in such a case the servant is not a witness for his master without a release. Thus, in an action to recover back money, which had been intrusted to the plaintiff's servant for a special purpose, and paid by the servant in illegal insurances, he was considered incompetent without a release. (4) And in an action against the defendant for the negligence of his servant, the servant is not competent to disprove the fact of his negligence (5): for since the verdict might be given in evidence in an action by the defendant against the witness, as to the quantum of damages, the servant is directly interested to defeat the action, and does not come within the exception above specified. But in an action of trespass, where the ques-

(1) M'Braine v. Fortune, 3 Campb. 317.

(2) See ante, p. 68.

(3) Bull. N. P. 289.

(4) Corking v. Jarrard, 1 Campb. 37. In Clarke v. Shee, Cowp. 199. which was a similar case, a release was given. See anonymous case, 1 Salk. 289.; Bull. N. P. 39. 289. S. C.; and anonymous case, Bull. N. P. 290. These were actions by a master to recover property embezzled by his servant, and the servant was admitted a witness to prove delivery to the defendant; but it does not appear whether the plaintiff gave a release.

(5) Green v. New Riv. Company, 4 T. R. 589. Bird v. Thompson, 1 Esp. N. P. C. 339. Miller v. Falconer, 1 Campb. 251. 6 Esp. N. P. C. 73.

tion is, on a plea of licence, whether the defendant has exceeded what he had the plaintiff's permission to do, the defendant's workmen, employed to do the work, are competent witnesses on his behalf; for though the plaintiff may have a verdict, yet it does not follow that the workmen would be liable, and the verdict would certainly not be evidence against them. (1)

Sect. VIII.

Of the means by which the Competency of an interested Witness may be restored.

The last question that remains to be considered, on this part of our subject, relates to the regular mode of making the objection to the competency of a witness, and to the means of restoring his competency.

Objection, how taken.

The rule formerly was, that the objection ought to be made on the voire dire, and, if made after the examination in chief, it would not have the effect of excluding the witness; though, even then, his incompetency might be shewn in another stage of the proceeding, for the purpose of impeaching the witness's credit. (2) But for the convenience of the court, and because the incompetency may not at first be suspected, a greater latitude has been since allowed. And now, if it is discovered during any part of the trial that a witness is interested, his evidence will be struck out. (3)

The party, against whom a witness is called, may examine him respecting his interest on the voire dire, or may call another witness, and produce other evidence, in support of

(1) Cuthbert v. Gostling, 3 Campb. 515.

(2) See Ld. Lovat's case, 9 St. Tr. 646.

(3) Turner v. Pearte, 1 T. R. 720. Perigal v. Nicholson, 1 Wightwick, 64. Howel v. Lock, 2 Campb. 14.

the objection. The old rule is said to have been (1), that, if the witness were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. But the modern and more convenient practice seems to be, that if the fact of interest is satisfactorily proved, the witness will be incompetent, though he may have ventured to deny it on the voire dire. And if the opposite party raise the objection of interest by independent evidence, and without putting a question to the witness, then the party, who has called him, cannot be allowed to put a question to him in order to repel the objection.

Examination on *voire dire.*

A witness may be examined, on the voire dire, as to the contents of a will or deed, or other written instrument, under which he is supposed to acquire an interest in the subject-matter of the suit. The general rule, which requires a notice to be given for the production of an instrument, before a witness can be allowed to speak to its contents, does not apply to such a case; for the opposite party may possibly be ignorant of the existence of the instrument, and cannot be supposed to know, that a particular witness would be called on the other side. But if the witness himself produces the very instrument, on which the objection to his competency rests, the instrument ought to be read, as the best proof of the witness's situation. (2)

Objection removed on *voire dire.*

When the objection arises from a witness's answer on the voire dire, it may be likewise removed on the voire dire. Thus, where, in an action brought by a chartered company, a witness for the plaintiffs admitted, on the voire dire, that he had been a freeman of the company, but added that he was then disfranchised, Lord Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the

(1) By Lord Hardwicke, in Lord Lovat's case, 9 St. Tr. 647.

(2) Butler v. Carver, 2 Starkie. 434.

company's books, and that the witness was competent. (1) And in a later case, on a question of settlement, where the point for the consideration of the Court of King's Bench was, whether a witness produced by the appellants could be examined, after having admitted in his examination on the voire dire, that he was the occupier of a cottage in the appellant township, but that he had never been charged with or paid any public rate or tax in that township, the court held, that there was no ground for objecting to his testimony, and that it was not necessary for the appellants to produce the rate, in order to negative the rating. (2) In another case, where a witness was objected to as next of kin, in an action by an administrator, but on re-examination answered, that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (3)

The objection, in the cases last cited, arose from the examination on the voire dire, and was removed also on the voire dire. But when the party, who calls a witness, attempts to remove the objection by other independent proof, and not on the voire dire, he will then be subject to all the general rules of evidence; and the best proof will be requisite, according to the nature of the case. Thus, if another witness is called, to prove that the witness, supposed to be interested, has been released; he cannot be allowed to speak of the contents of the release, but the release itself, if in existence, ought to be produced. (4) The same rule has been laid down by Lord Kenyon in another nisi prius case. (5)

Competency restored by release.

Whatever interest a witness may have had, if he is divested of it by release or payment or any other means, when he is ready to be sworn, there is no objection to his competency. Thus it is said " to have been solemnly agreed by the judges,

(1) Butchers' Company v. Jones, 1 Esp. N. P C. 162. Botham v. Swingler, Peake, N. P. C. 218. 1 Esp. N. P. C. 164. S. C.

(2) R. v. Gisburn, 15 East, 57

(3) Ingram v. Dade, Lond. Sitt. after Mich. T. 1817.

(4) Corking v. Jarrard, 1 Campb. 37.

(5) Botham v. Swingler, 1 Esp. 164.

that where a person had a legacy given him and did release it, he was a good witness to prove the will. (1)" *

A general release of all actions and causes of action, for any matter or thing which has happened down to the time of the release, will discharge the witness from all liability depending upon the event of the existing suit. Such a release from a defendant, who had drawn a bill of exchange, to the witness, who accepted it, was held to have this effect (2); for, as Lord Ellenborough said in that case, the transaction was already past, which was to lay the foundation of future liability; and if the drawer should have a cause of action against the acceptor, it would have reference back to the acceptance, and would be discharged by the release. A similar point arose in the case of Cartwright v. Williams (3), where the defendant was the acceptor, and the witness was one of the drawers, for whose accommodation the bill had been accepted: there the witness was a bankrupt, and it was objected that a release from the assignees was necessary, in addition to the general release, since the defendant, as surety, might prove the debt under the commission of the witness, in case the plaintiff should recover in this action; but Lord Ellenborough held, and the Court of King's Bench were afterwards of the same opinion, that the release in question, comprehending all future claims in conse- General release.

(1) Vin. Ab. tit. Evidence, 14. n. 53. cited by Ld. Mansfield, 1 Burr. 123.

(2) Scott v. Lifford, 1 Campb. 249.

(3) 2 Starkie, 342.

* Lord Chancellor Hardwicke established the will of Lord Ailesbury on similar proof, in the year 1748. (See 1 Burr. 427.) And in Wyndham v. Chetwynd (1 Burr. 414.) where the subscribing witnesses were creditors of the testator, as their debts had been paid, they were admitted to prove the will. So in Doe dem. Hindson v. Kersey, (4 Burn. Ec. Law, 97.) three of the judges were of opinion, that a subscribing witness was restored to his competency, if all his interest had been released or extinguished at the *time of the examination*. Lee C. J., in Anstey v. Dowsing (2 Str. 1253.), and Ld. Camden, C. J., in Doe on the demise of Hindson v. Kersey, were of opinion, that, if a subscribing witness was interested at *the time of attestation*, nothing *ex post facto* could give effect to his attestation. In the former of these cases, Mr. Justice Dennison differed from Lee C. J. on this point. (See 1 Burr. 427, 428.)

quence of any cause existing at the time of granting the release, would extend to bar any claim of the defendant as surety on the bill, this being an inchoate cause of action then existing.

Release by guardian; and by co-obligee.

In an action against a minor who appears by his guardian, a release by the guardian will not be sufficient, the guardian not having any authority to release. (1) A release of a bond-debt by one of several obligees will operate as a release by all (2); and a release to one of several obligors will have the same effect as to all the others, whether the bond be joint, or joint and several. (3)

Release on trial for forgery.

On a trial for forgery, a release from the holder of a promissory note to the supposed drawer, in whose name it was forged, (there being no other name on the note, to whom the drawer could be liable,) made him a competent witness to prove the forgery of his hand-writing. (4) But a witness, by whom a bill of exchange purports to be indorsed, is not rendered competent by a release from the person to whom the bill in question had been uttered, but who had not given value for it; for he has no interest in the bill, and the prisoner appearing to be the holder, a release from any other person would not be effectual. (5)

Release by bankrupt; and by creditor of bankrupt.

To restore the competency of a bankrupt, (who, from being interested to increase the fund, cannot be admitted to prove property in himself, or a debt due to his estate,) (6), it must be shewn, that he has obtained his certificate, and given to the assignees a release of his share in the surplus and in the dividends. (7) If he gives a general release to his assignees, it is sufficient; as it discharges him from receiving any sum of money from the assignees. (8) But no release can make the

(1) Fraser v. Marsh, 2 Starkie, 41.
(2) Bayley v. Lloyd, 7 Mod. 250.
(3) 2 Roll Ab. 412. (G).
(4) Akehurst's case, 1 Leach, Cr. C. 178. Dr. Dodd's case, ib. 184.
(5) R. v. Young, Worc. Lent Ass. 1805. MS.
(6) See ante, p. 63.
(7) Ewens v. Gold, Bull. N. P. 43.
(8) Nares v. Saxby, cited 2 T. R. 497.

bankrupt a witness to prove his own act of bankruptcy. (1) And, after a second bankruptcy, he cannot be a witness to increase the fund, even with a certificate and release, unless he has paid fifteen shillings in the pound; for, in the event of his not making that payment under the second commission, his future effects are liable. (2) A creditor, who releases his debt to the assignees, is competent to prove the act of bankruptcy, although the action is brought by the bankrupt, who disputes the commission (3); and a release to the assignees alone is sufficient. (4)

Release from residuary legatee.

A residuary legatee is not rendered a competent witness, in an action by an executor to recover a debt due to the testator, by releasing all claim to the debt in question; for if the plaintiff fail in the suit, although he would not be liable for costs to the opposite side, he must pay costs to his own attorney. (5) The executor would be entitled to the allowance of these costs out of the estate, the action being brought *bonâ fide*; and thus, independently of the debt to be recovered, the residue would be diminished. The witness, therefore, has still an interest to support the action, and can only be rendered competent, by releasing the residue, or by a release of the costs of the action from the attorney.

Member of Corporation, how rendered competent.

When a witness is objected to as the member of a corporation, whose interests are in question, his competency may be restored either by his resignation, (which will be effectual even by parol, provided that it has been accepted, and another person elected in his place) (6), or by disfranchisement. The method of disfranchisement is said to be by an information in the nature of a quo warranto against the member, who then confesses the information, and upon that there is judgment

(1) Field v. Curtis, 2 Str. 829. See ante, p. 64.

(2) By st. 5 G. 2. c. 30. s. 9. Kennet v. Greenwollers, Peake, N. P. C. 5.

(3) Koopes v. Chapman, Peake, N. P. C. 19.

(4) Ambrose v. Clendon, Rep. temp. Hard. 267.

(5) Baker v. Tyrwhitt, 4 Campb. 27.

(6) R. v. Mayor, &c. of Rippon, 2 Salk. 432. Com. Dig. tit. Franchise, (F. 30.)

of disfranchisement. (1) This judgment must be such as cannot be avoided: for, if it appears that the witness can avoid the judgment for irregularity, (as he may, if he has never been summoned, and knew nothing of his disfranchisement,) he is not competent. (2)

Release, when unnecessary.

A release is in some cases unnecessary: and the witness though interested will be admitted without a release.

1. Offer to release.

1. First, where the witness offers to surrender or release his interest, and does all in his power to clear away every objection to his testimony, but the other party refuses to accept it, in that case the evidence of the witness may be received. (3) Or if the party, on whose side the witness is interested, makes an offer to remove all interest, and the witness refuses, that will not deprive the party of his testimony. In the case of Anstey v. Dowsing (4), indeed, Lee J. expressed an opinion, that a legatee was not competent to prove the due execution of the will, although payment of the legacy was tendered to him, which tender he refused. But the ground of this opinion was, that, even if he had accepted the legacy, he still would have been incompetent, as having been interested at the time of attestation; a point, on which there has been some difference of opinion, but the greatest authorities are in support of the contrary proposition, namely, that the payment of the legacy would restore the competency of the witness. (5)

2. Interest acquired fraudulently.

2. If a witness has acquired an interest in the subject-matter, for the mere purpose of depriving a party to the suit of the benefit of his testimony, this ought not to exclude him from giving evidence. It was ruled by Lord Holt in the case of Barlow v. Vowel (6), that if a man be a witness of a wager, and afterwards bet himself, this shall not be a reason to except

(1) The case of the Mayor, &c. of Colchester, 1 P. Wms. 595. n.

(2) Brown v. Corp. of London, 11 Mod. 225.

(3) Goodtitle dem. Fowler v. Welford, 1 Doug. 139. 3 T. R. 35.

(4) 2 Str. 1253. See ante, p. 133.

(5) See ante, p. 133.

(6) Skin. 586. See Rescous v. Williams, 3 Lev. 152. and Cowp. 736.

against his being sworn to prove the wager. And from analogy to this case, Lord Kenyon and Mr. Justice Ashhurst were of opinion in the case of Bent v. Baker (1), (where, on the trial of an action on a policy of insurance, the broker had been called as witness for the defendant, but rejected, because he had underwritten the policy after the defendant,) that, even if it were true in general, that one underwriter could not be a witness for another, yet the witness ought to have been admitted in that case, as the defendant had acquired an interest in his testimony before the witness had signed the policy. And they laid down as a general principle, deducible from the case of Barlow v. Vowel, that, where a person makes himself a party in interest after a plaintiff or defendant has an interest in his testimony, he may not by this deprive the plaintiff or defendant of his testimony. However, it appears to be rather doubtful, whether this proposition is not expressed in too large and general terms. Whether a witness is incompetent on account of interest, must depend rather on the nature of the interest, than upon the time of acquiring it. The question on the voire dire is, whether he is interested at the time of his examination. If he is directly interested at that time, he is not a competent witness in general without a release, and it seems to be no answer to the objection, to shew that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact, which he is called to prove. If, for example, the question is on a customary right of common, a witness will be incompetent, who admits upon the voire dire, that he is in the occupation of a messuage, and that he claims a similar right of common as annexed to his tenement; and it cannot be material, whether he has been in possession for a number of years, or had the tenement only just before the trial of the cause. In either case he appears to be equally incompetent; yet in the latter it may be said, that he acquired his interest, after the party had become interested in his testimony. The case of Barlow v. Vowel must be considered as having been determined on the ground of fraud: the witness, proposed to be examined, was the original witness of the

(1) 3 T. R. 27. See ante, p. 46.

wager: it was a fraud, therefore, to deprive the party of the benefit of his testimony. (1)

In the late case of Forester v. Pigou (2), where the defendant, in an action on a policy of insurance, called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the voire dire the witness stated, "that he had paid the loss to the plaintiff, upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event," an objection was taken to his competency, on the ground of his being interested in the event; the point was argued on the other side upon the authority of Barlow v. Vowel, and it was said, the witness had not become interested until after the commencement of the action, and that the plaintiff ought not to be allowed to defeat by his own act the interest, which the defendant had in the witness's testimony; but the witness was considered to be incompetent and rejected: for although the witness would not be disqualified by any agreement *fraudulently* entered into between him and the plaintiff for the purpose of taking off his testimony, yet on the other hand the pendency of a suit could not prevent third persons from transacting business *bonâ fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. A motion was afterwards made for a new trial, on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time, when the undertaking was made to the witnesses; but the court added, that, if a person, who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of the suit, he becomes as

(1) By Lord Ellenborough in Forester v. Pigou, 1 Maule & Selw. 9. in which this case was much cited.

(2) 3 Campb. 380. 1 Maule and Selw. 9. S.C.

much interested in the event, as if he were a party to a consolidation rule.

Lord Raymond in the case of the King v. Fox (1) admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant: and the true reason seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness by any such gratuitous act to exclude himself from giving evidence; and there seems to be another reason for admitting the witness, since the wager would now probably be considered absolutely void, on a principle of public policy, as tending to produce an improper bias on the mind of the witness, and therefore as directly prejudicial to the administration of justice.

3. Witness indifferent.

3. When the witness must be answerable to one or the other of the parties, and the event of the suit determines only to which, he may be examined by either of them without a release. Thus in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain to prove, that he had received the money from the plaintiff for the defendant's use; for he stood indifferent between the parties, and he was equally answerable, whichever way the verdict might go. (2)

(1) 1 Str. 652.
(2) Evans v. Williams, 7 T.R. 481. n. (*c*), and see ante, p. 68 on this subject.

CHAP. VI.

Of the Admissibility of Counsel or Solicitor.

THE objections to the competency of a witness, which have been considered in the four preceding chapters, are of a nature to exclude him from giving any kind of evidence. One other objection still remains to be considered; not an

objection to his competency, but to particular evidence, which he may be called upon to disclose. This is founded on the professional confidence, which a client reposes in his counsel, attorney, or solicitor, and which courts of justice ever hold to be inviolable. (1)

Extent of the rule.

Confidential communications between attorney and client are not to be revealed at any period of time — not in an action between third persons — nor after the proceeding, to which they referred, is at an end — nor after the dismissal of the attorney. (2) The privilege of not being examined to such points, as were communicated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney; and it never ceases. "It is not sufficient to say, the cause is at an end; the mouth of such a person is shut for ever. (3)

An attorney will not be allowed to produce a deed which has been deposited with him confidentially in his professional character; and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus in a case, tried before Mr. Justice Bayley (4), the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel for the plaintiff offered in evidence a copy of the deed, which had been obtained from one who acted many years ago as attorney for the person, under whom the defendant claimed, and who had been entrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected, that this evidence ought not to be received, as the original deed had been depo-

(1) Lord Say and Seale's case, 10 Mod. 40. Bull. N. P. 284. Cuts v. Pickering, 1 Ventr. 197. The reader may see some very judicious observations on this subject in Burnet's Treatise on the Criminal Law of Scotland, 435—438.

(2) Wilson v. Rastall, 4 T. R. 759, 760. Sloman v. Herne, 2 Esp. N. P. C. 695. R. v. Withers, 2 Campb. 578. Gainsford v. Grammar, 2 Campb. 10.

(3) By Buller J. 4 T. R. 759.

(4) Fisher v. Heming, Leic. Lent. Ass. 1809. See Copeland v. Watts, 1 Starkie, 95.

sited confidentially with the attorney; and Mr. Justice Bayley refused to admit it. He said, "the attorney could not give parol evidence of the contents of the deed, which had been entrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a writing or a verbal communication. It is the privilege of his client, and continues from first to last."

This privilege of the client is confined to such communications as are made with reference to professional business during the relation of attorney and client. A person, by profession an attorney, but not employed as attorney in the particular business, which is the subject of enquiry, is not within the rule, although he may have been consulted confidentially. (1) If the party waves his privilege, the witness may of course be examined.

A person who acts as interpreter (2), or agent (3), between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secresy. But it has been ruled at Nisi Prius, that a person, who was consulted confidentially on the supposition of his being an attorney, when in fact he was not one, is compellable to answer. (4) And propositions, which the attorney of one party has been professionally intrusted to make to the adverse party, though they are not to be disclosed by the attorney himself, may yet be proved by another witness, who heard him deliver them. (5)

Rule confined to professional advisers.

This professional privilege extends to the three enumerated cases of counsel, solicitor, and attorney; but it is confined to

(1) Wilson v. Rastall, 4 T. R. 753. 760.

(2) Du Barrê v. Livette, Peake, N. P. C. 78. cited by Lord Kenyon in 4 T. R. 756.

(3) Parkins v. Hawkshaw, 2 Stark. 239. In this case the agent for the defendant's attorney was proposed to be examined as to communications which he had with the defendant, for the purpose of proving the identity of the party in an action on a bond, but rejected by Holroyd J.

(4) Fountain v. Young, 6 Esp. N. P. C. 113.

(5) Gainsford v. Grammar, 2 Campb. 10

those cases alone. (1) There are, indeed, cases, said Mr. Justice Buller in the case of Wilson and Rastall, to which it is much to be lamented that the law of privilege is not extended; those, in which medical persons are obliged to disclose the information, which they have acquired by attending in their professional characters. (2) This point was much considered in the Duchess of Kingston's case, where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence.

The language and sentiment of Lord Kenyon on this subject, in the case before cited, of Wilson v Rastall, are so characteristic, they ought not to be omitted, "If a friend," said the Ch. Justice, "could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life, for instance Doctor Ratcliff's case. (3) And if the priviledge, now claimed, extended to all cases and persons, Lord W. Russell died by the hands of an assassin, and not by the hands of the law; for his friend Lord Howard was permitted to give evidence of confidential conversations between them. (4) All good men, indeed, thought, that he should have gone almost all lengths, rather than have betrayed that confidence; but still, if the privilege had extended to such a case, it was the business of the court to interfere, and prevent the evidence being given."

In a late case at Nisi Prius, where a clerk to the commissioners of the property-tax was called to prove the defendant a collector, and refused to give evidence, on the ground of his having taken an oath of office, not to disclose what he should learn as clerk respecting the property-tax, except with the consent of the commissioners or by force of an act of parliament, the Court held that this oath would not exempt the witness, and that it must be construed, as containing an implied exception of the evidence, which he might be called to give in courts

(1) 4 T. R. 758. Vaillant v. Lodemead, 2 Atk. 524.

(2) 4 T. R. 759. See also R. v. Sparkes, cited in Peake, N. P. C. 77. Du Barré v. Livette.

(3) 9 St. Tr. 582.

(4) 3 St. Tr. 715.

of justice in obedience to the writ of subpœna. (1) In an early case (2), indeed, where the defendant pleaded, to an action of debt on a bond, the statute against buying and selling of offices, and called a witness to shew on what occasion the bond was given, Lord Holt is said to have refused his evidence, because it appeared, that he was privately intrusted to make the bargain and to keep it secret. But the principle and authority of this case seem to have been overruled by that of Wilson v. Rastall, and the later decisions on this subject.

To what facts the attorney may be examined.

The attorney of a party in the cause may be examined like any other witness, where he knew the fact before the retainer, that is, before he was addressed in his professional character (3); or, where he has made himself a party to the transaction (4); or, where he is questioned to a collateral fact within his own knowledge, or to a fact which he might have known without being intrusted as attorney in the cause. (5) Thus, if he is a subscribing witness to a deed, he may be examined* concerning the execution. (6) So, if there be a question about an erasure in a deed or will, he may be asked, whether he had ever seen the instrument in any other state, for it is a fact within his own knowledge; but he ought not to be permitted to disclose any confessions, which his client may have made to him on the subject. (7) So, if an attorney were present, when his client was sworn to an answer in chancery, he might be a witness on an indictment for perjury, to prove the fact of taking the oath, which is a fact not peculiarly within his knowledge as an attorney, and not committed to him in secresy. (8) So, the attorney of one of the parties may be examined as to the contents of a written notice, which

(1) Lee q. t. v. Birrell, 3 Camph. 337.
(2) Bull N. P. 284.
(3) Cuts v. Pickering, 1 Vent. 197. Lord Say and Seale's case, 10 Mod. 40.; Bull. N. P. 284. S. C. 4 T. R. 759.
(4) Duffin v. Smith, Peake, N. P. C. 108. Robson v. Kemp, 5 Esp. N. P. C. 52. Cowp. 845.
(5) Bull. N. P. 284. By Lord Mansfield C. J. in Duchess of Kingston's case, 11 St. Tr. 253. And see Parkins v. Hawkshaw, stated in p. 141. (3).
(6) Doe dem. Jupp v. Andrews, Cowp. 846. Robson v. Kemp, 4 Esp. N. P. C. 235.; 5 Esp. N. P. C. 53. S. C.
(7) Bull. N. P. 284. 1 Ventr. 197.
(8) Bull. N. P. 284. By Lord Mansfield C. J. in Cowp. 846. R. v. Watkinson, 2 Str. 1122. contra; but the reporter makes a quære.

had been received by him in the course of the cause calling upon him to produce papers. (1)

On the same principle, in an action of debt upon a bond, the plaintiff's attorney was admitted by Lord Kenyon to prove, that the bond had been given on an usurious consideration. (2) And where a person, (who had brought an action on a promissory note, which was afterwards compromised by the defendant,) had informed the attorney after the compromise, that there never had been any consideration for the note, the Court of King's Bench held, that the attorney was compellable to disclose that circumstance, in an action brought to recover back the money. (3) The communication, said Lord Kenyon, was not here made in contemplation of a suit. On the contrary, the purpose in view had been already obtained; and what was said by the client was from exultation, in having before deceived his attorney as well as his adversary.

If the attorney of one of the parties to the suit is examined as a witness for his client, the counsel on the other side may cross-examine him as to the same matter, but not as to any other points of the cause (4); on all such points the privilege of the client seals his mouth.

(1) Spenceley v. Schullenberg, 7 East, 357.

(2) Duffin v. Smith, Peake, N. P. C. 108.

(3) Cobden v. Kendrick, 4 T. R. 432.

(4) Vaillant v. Dodemead, 2 Atk. 524.

CHAP. VII.

Of certain general Rules of Evidence.

IF no objection is made to the competency of a witness, and he is allowed to give evidence, the next question is, what evidence ought to be given; and in what manner is the witness to be examined. It will, therefore, now be necessary to inquire into certain general rules, which have been established for the

purpose of directing the testimony of witnesses, and for the more effectual attainment of the ends of justice.

General rules of evidence.

Some general rules relate to the issue joined between the parties. One of these is, that the evidence, which either party produces, ought to be confined to the points in issue. This is an universal principle or axiom, and admits of no exception. As the true end and object of pleading is to raise the point in issue, so the true aim of evidence must be to hit that point. Every proof ought to bear, directly or indirectly, upon the facts in dispute. And an irrelevant argument is not more unsound in point of reasoning, than irrelevant evidence is in point of proof.

Another general rule is, that the substance only of the issue needs be proved. This is founded on the principles of good sense and justice. If a party prove the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. Such averments serve only to encumber the record; and the proof of them would be as immaterial as the averments themselves. The former rule, then, co-operates with good pleading; this counteracts defective pleading.

A third general rule is, that the affirmative of the issue ought to be proved. This relates to the person who is to prove the issue, and casts the burthen of proof on the affirming party. It is, however, by no means an universal rule, like the two former, and admits of many exceptions.

The rules, just mentioned, relate to the general aim or tendency of proof, with reference to the issue. There are other rules, relating to the *medium* of proof, independently of the form of the issue. Such is the general rule, that the best evidence, which the nature of the case admits, ought to be produced; a rule adopted by courts of justice, as a safeguard

and security for the discovery of truth. The rules, before noticed, shew, what facts are to be proved; this shews, how they are to be proved. The substance of the issue is not only to be proved, but to be proved by the best evidence. — Another rule, usually classed among the general rules of evidence, and relating, like the last, to the *medium* of proof, is, that hearsay of a fact is not admissible.

The consideration of these rules will form the subject of the present chapter. But before we come to examine them, it will be convenient to inquire, first, in what cases the testimony of a single witness is not a sufficient proof of a fact; and, secondly, as to the nature of presumptive evidence.

The order in which it is proposed to consider the subject, is the following:

First, of the number of witnesses for the proof of a fact;

Secondly, of the nature of presumptive evidence;

Thirdly, That evidence is to be confined to the points in issue;

Fourthly, That the affirmative of the issue is to be proved;

Fifthly, That the substance only of the issue need be proved;

Sixthly, That the best evidence is to be given, which the nature of the case admits;

Lastly, That hearsay evidence is not admissible.

Sect. I.

Of the Number of Witnesses, for the Proof of a Fact.

General rule.

The general rule at common law is, that a single witness, if credible, is sufficient for the proof of any fact. The law of England differs in this respect from the civil law, where one of the maxims is, "unius responsio non omnino audiatur;" and by the law of Scotland at this day, the testimony of a single witness is not lawful evidence to convict. (1) Lord Coke has said in his Commentary (2), that "when a trial is by witnesses, as in the case of the challenge of a juror or summons of a tenant, the affirmation ought to be proved by two or more witnesses, but, where the trial is by verdict, there the judgment is not given upon witnesses, but upon the verdict, and upon such evidence as is given to the jury they find their verdict." But this distinction has been denied by Lord Holt (3), and the doctrine is said not to be warranted by the authorities cited in its support.

In deciding upon the effect of evidence, the question is, not by how many witnesses a fact may have been proved, but whether it has been proved satisfactorily, and so as to convince the understanding. The number of witnesses is not more conclusive on matters of proof, than a number of arguments on a subject of reasoning. If the law were in every case to require peremptorily two witnesses, this would by no means ensure the discovery of truth; but it would infallibly obstruct its discovery, wherever a fact is known only to a single witness; and thus secret crimes might escape with impunity. Abstractedly speaking, there cannot be any reason for suspecting the evidence of a witness, because he stands alone. The evidence of a single witness may be so clear, so full, so impartial, so free from all suspicion and bias, as to produce in every mind, even in the most scrupulous, the strongest and deepest conviction. On the other hand, witness may crowd after witness, all asserting the same

(1) Hume's Comment. on the Laws of Scotland, 2d vol. 369.

(2) Co. Lit. 6. *b*.

(3) Shotter v. Friend, Carth. 144.

facts, yet none be worthy of credit. In short, it is the character of witnesses, and the character of their evidence, that ought to prevail, not their number.

By the law of England, however, the testimony of a single witness will not be sufficient in cases of perjury and high-treason.

In case of perjury.

First, On an indictment for perjury, the evidence of one witness is not sufficient to convict the defendant; because then there would only be one oath against another. "To convict a man of perjury," said C. J. Parker, in the case of the Queen v. Muscot (1), "there must be strong and clear evidence, and more numerous than the evidence given for the defendant." It does not appear to have been laid down, that *two witnesses* are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite. But, at least, one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be produced.

In case of treason.

Secondly, It was enacted, for the security of the subject, by stat. 1 Ed. 6. c. 12. s. 22., that "No person shall be indicted, arraigned, condemned, or convicted for any offence of treason, petit treason, misprision of treason, unless the offender be accused by two sufficient and lawful witnesses, or willingly without violence confess the same." By the common law one witness would have been sufficient on the trial of those offences; and this is the first act of the legislature, where two witnesses are required. A similar provision is contained in the stat. 5, 6 Ed. 6. c. 11. s. 12., which enacts, that "No person shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons or offences in that act mentioned, or for any treasons which then were or hereafter might be, unless the offender should be accused by two lawful accusers, who at the time of the arraignment should be brought,

(1) 10 Mod. 193.

&c., unless the party arraigned should willingly without violence confess the same."

Thus it appears, that two witnesses would at that time have been necessary in treasons relating to the coin of the kingdom, as well as in other kinds of treason. But an alteration in this respect was made by the stat. 1, 2 Ph. & Mary, c. 10. s. 12. and 1, 2 Ph. & Mary, c. 11. s. 3., which provided, that "in all cases of high treason concerning the current coin, or for counterfeiting the king's signet, privy seal, and great seal, or sign manual, and on trials for bringing counterfeit coin into the realm, or for any offence concerning the impairing, counterfeiting, or forging the current coin, the prisoners should be tried by the same evidence, as they were before the reign of Edward the Sixth." (1) In these cases, therefore, a single witness will now be sufficient; and it has been agreed by all the Judges, that these statutes extend to all offences, touching the impairing of the coin, which should afterwards be made treason. (2)

In treason relating to the coin.

The stat 7, 8 W. 3. c. 3., which relates only to such treasons as induce corruption of blood, enacts in the second section, that "No person shall be tried or attainted of that species of high treason, or of misprision of such treason, but by the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted and tried shall willingly without violence in open court confess the same, or shall stand mute, or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury." And by the 4th section it is enacted, "If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be

In high treason.

(1) The like provision in statute 8, 9 W. 3. c. 26. s. 7., and stat. 6 G. 3. c. 53. s. 3

(2) Gahagan's case, 1 Leach, Cr. C. 50. 1 East. P. C 129 S. C.

deemed to be two witnesses to the same treason within the meaning of this act."

Long before this act of the 7th and 8th of William, it had been resolved, at a conference among the Judges, preparatory to the trial of the Regicides (1), that one witness to prove one act tending to the compassing of the king's death, and another witness to prove another act tending to the same end, were sufficient, and that there need not be two witnesses to prove every overt act tending to the compassing of the king's death. And at the trial of Lord Stafford (2), all the Judges present delivered their opinions upon the same point, and declared that one witness to one overt act, and another to another overt act of the same species of treason, are two sufficient witnesses within the statutes; and the reason given was, because otherwise it would be a most difficult thing and almost impossible to convict any one of high treason for compassing the death of the king, for such compassings are seldom acted in the presence of two witnesses at one time present. From that time the rule was considered as completely settled, and on many occasions before the act of the 7th of William it was strictly followed. (3)

Some alteration has been since made in the worst species of high treason, where an attempt is made on the king's person; and in that case, the principle and mode of proceeding at common law are restored. The stat. 39, 40 G. 3. c. 93. enacts, that "in all cases of high treason, when the overt act alleged in the indictment is the assassination of the king or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder." A conviction, therefore, in such a case may proceed on the testimony of a single witness.

The language of the statutes of Edward 6. is, that "the

(1) Kelyng, 9.
(2) Sir T. Raym. 407.
(3) See Fost. 236. and Sir W. Parkyns's case, 4 St. Tr. 650, 651.

offenders are to be accused by two witnesses," that is, two witnesses are required to prove the offence or overt act of treason; and the stat. of W. 3. expressly confines itself to the proof of the overt acts. With respect to all other acts, therefore, which are merely collateral and not conducive to the proof of the overt acts, the rule of common law is not altered, and one witness is still sufficient. (1)

Rule in courts of equity.

It is an established principle in courts of equity, that on a bill praying relief, when the facts charged by the plaintiff, as the ground for obtaining a decree, are proved only by a single witness, and are *clearly* and *positively* denied by the answer of the defendant, the Court will not grant a decree against the defendant. (2) But where the evidence produced by the plaintiff is so far supported and corroborated by proof of concurring circumstances, as to outweigh the denial in the defendant's answer (3), (abstracting from the mind, that the evidence on the part of the plaintiff comes from a disinterested witness (4), the former rule will not apply; and the evidence of a single witness, so strengthened and confirmed, will enable the Court to decree against the answer. And there are many cases, in which the Court has granted a decree against the defendant on the testimony of a single witness, when his testimony has not been clearly and positively contradicted by the answer. (5)

Rule in ecclesiastical courts.

By the civil law, as was before observed, two witnesses are required for the proof of a fact; and such is the rule in ecclesiastical courts, whose practice is founded upon that law. But even in those courts, if a matter cognizable at common law arises incidentally in an ecclesiastical suit, (as, where a revocation of a will is pleaded, or payment of a legacy, or plenè administravit, and the like,) the proof ought to be according

(1) Smith's case, Fost. 242.

(2) L'Neve v. L'Neve, 1 Ves. 64. 66. 3 Atk. 646. S. C. 1 Ves. 97. 125. 2 Ves. jun. 243. East India Comp. v. Donald, 9 Ves. 282, 283.

(3) Walton v. Hobbs, 2 Atk. 19. Janson v. Rany, ib. 140. Pember v. Mathers, 1 Bro. Ch. Ca. 52. Toole v. Medlicott, 1 Ball & Beattie, 403. Biddulph v. St. John, 2 Scho. & Lef. 521.

(4) 9 Ves. 283.

(5) 3 Atk. 650. 1 Ves. 66. 97. 12 Ves. 80. 3 Ves. & Beam. 89.

to the principles and courts of the common law; and if they disallow the plea, because it is proved only by a single witness, they may be controlled by a prohibition. (1)

Sect. II.

Of the Nature of Presumptive Evidence.

Evidence consists either of positive or of presumptive proof. The proof is positive, when a witness speaks directly to a fact from his own immediate knowledge; and presumptive, when the fact itself is not proved by direct testimony, but is to be inferred from circumstances, which either necessarily or usually attend such facts. (2) This latter is also called circumstantial evidence. It is obvious, that a presumption is more or less likely to be true, according as it is more or less probable, that the circumstances would not have existed, unless the fact, which is inferred from them, had also existed: and that a presumption can only be relied on, until the contrary is actually proved.

In order to raise a presumption, it cannot be necessary to confine the evidence to such circumstances alone, as could not have happened, unless they had been also attended by the alleged fact, — for that in effect would be to require in all cases evidence amounting to positive proof; — but it will be sufficient to prove those circumstances, which usually attend the fact. The definition of the civilians is most correct, "presumptio nihil aliud est, quam argumentum verisimile, communi sensu perceptum, ex eo quod plerumque fit aut fieri intelligitur." A presumption, then, is a probable inference, which our common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability;

(1) Sir W. Juxon v. Lord Byron, 2 Lev. 64. Richardson v. Disborow, 1 Ventr. 291. Shotter v. Friend, Carth. 142. 1 Ld. Ray. 221. Cowp. 424. Com. Dig. tit. Prohibition, (F. 13.) and (G. 23.)

(2) Gilb. Ev. 142.

and there are almost infinite shades from the lightest probability to the highest moral certainty. If the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, it is to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. (1) However, for the purpose of trying the weight and effect of such presumptive proofs, it will often be of the utmost consequence to consider, whether any other fact happened, which might have been attended by the same circumstances, and with which of the facts they are most consistent.

It has been very justly observed (2), that when the proofs are dependent on each other, or when all the proofs are dependent upon one, the number of proofs neither increase nor diminish the probability of the fact; for the force of the whole is not greater than the force of that on which they depend; and if this fails, they all fall to the ground. But when the proofs are distinct and independent of each other, the probability of the fact increases in proportion to the number of the proofs; for the falsehood of one does not diminish the veracity of another.

There are presumptions of law, as well as presumptions of fact. Some presumptions of law are considered so strong and conclusive, as not to admit of contrary proof; but there are few instances of this, and much fewer in the present day than formerly, the doctrine of conclusive presumptions applying principally, if not exclusively, to estoppels. That innocence is to be presumed, till the contrary is proved, may be called a presumption of law, founded on the universal principles of justice. That a child born during marriage shall be presumed

(1) 2 H. Bl. 297.

(2) Beccaria, ch. xiv. The reader will find many sensible observations, on the subject of Presumption and Presumptive Evidence, in Evans's Appendix to his edition of Pothier on Contracts. Numb. 16. sect. 14.; and in a chapter in Burnett's Treatise on the Criminal Law of Scotland. There are also some sensible remarks in a small tract entitled "The Theory of Presumptive Proof."

to be legitimate, is another presumption of the same description. That grants and deeds are to be presumed in support of long undisturbed possession, is also a presumption of law, founded on principles of public policy and convenience. Something will be said, in the course of this section, on each of these presumptions.

Presumption of legitimacy.

Children, born during a lawful marriage, are presumed to be legitimate; but this presumption may be removed by competent proof of their illegitimacy. Formerly the rule was so strict in favour of legitimacy, that any proof of the contrary would not be admitted, unless the husband had been out of the kingdom during the whole time of gestation; but this doctrine has been long exploded. The general principle, to be deduced from the authorities on this subject, as it was laid down and confirmed by the case of the King v. Luffe (1), appears to be this, that where there are circumstances, which shew an impossibility that the husband could be the father, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, or from his continued absence, the presumption is at an end, and the child will be deemed illegitimate. In an earlier case (2), the Court of King's Bench held, that there was no necessity to prove the impossibility, if the other circumstances of the case tended strongly to repel the presumption of access. And this point has been since established by the opinion of the judges in the case of the Banbury claim of peerage (3), in which it was held, that, where the husband and wife are not proved to be impotent, and have had opportunity of access to each other during the period, in which a child could be begotten and born in the course of nature, the presumption of legitimacy, arising from the birth of the child during wedlock, may be rebutted by circumstances inducing a contrary presumption: and the fact of non-access (that is, the non-existence of sexual intercourse,)

(1) 8 East, 193. 206.
(2) Goodright dem. Thompson v. Saul, 4 T.R. 356.
(3) 2 Selw. N.P. 681.

as well as the fact of impotency, may always be lawfully proved by means of such legal evidence, as is strictly admissible in every other case, where a physical fact is to be proved. It has been held, that, in the case of a divorce *à mensâ et thoro*, a child born after such a separation is presumed to be illegitimate (1); in this case, therefore, the party, who ásserts the child's legitimacy, will have to prove access.

Pr. Ev. of payment.

A receipt for rent due on a certain day is strong presumptive evidence, that the former rents have been regularly paid down to that time. But it is only presumptive evidence; and the other party will be allowed to prove the contrary. "If a man give a receipt for the last rent," says Ch. B. Gilbert (2), "the former is presumed to be paid, because he is supposed first to receive and take in the debts of the longest standing; especially, if the receipt be in full of all demands, then it is plain there were no debts standing out; and if this be under hand and seal, the presumption is so strong, that the law admits of no proof to the contrary." So, in an action for work and labour done for the defendant, proof that the plaintiff and other workmen, who were employed by the defendant, came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain of non-payment, would be presumptive evidence of payment to meet a stale demand.(3)

In case of bonds.

In the case of a bond also, which has been suffered to lie dormant for 20 years, payment may be presumed. Forbearance for so long a time unexplained is a circumstance, from which the jury may and ought to infer, that the bond has been satisfied. (4) It has been sometimes said, that payment

(1) Parish of St. George v. St. Margaret, 1 Salk. 123.

(2) Gilb. Ev. 142. In Alner v. George, 1 Campb. 392. the plaintiff's receipt "in full of all demands" was held to be a bar to his action of assumpsit for goods sold. See also Dalzell v. Mair, 1 Campb. 532.; De Gaminde v. Pigou, 4 Taunt. 246., which two last cases shew, that an admission of the receipt of the premium, in a policy of insurance, is conclusive evidence of the payment, as between the assured and the underwriter.

(3) Lucas v. Novosilienski, 1 Esp. N. P. C. 296.

(4) 6 Mod. 22. 4 Burr. 1963. Oswald v. Legh, 1 T. R. 270.

may be presumed even within that time (1); but this is to be understood with reference only to those cases, where there has been some other evidence to raise such a presumption, as, the settling of an account in the intermediate time, without noticing any demand upon the bond. (2) However, the presumption arising after such a lapse of time may be repelled by proof of the defendants' recent admission of the debt; or by proof of the payment of interest within 20 years, which is an acknowledgment that the principal sum was not then discharged (3); or the presumption may be answered by proof of other circumstances, explaining satisfactorily why an earlier demand has not been made. (4)

Indorsements on a bond, purporting that interest has been paid on the principal sum, have been admitted in evidence, under certain circumstances, as proof of the fact there stated, to repel the presumption of payment of the principal, and to raise a contrary presumption, namely, that the principal sum has not been discharged. An indorsement to this effect in the handwriting of the *obligor*, or made by his direction, or with his privity, is clearly admissible in evidence against him, or against his personal representative, as an admission. But whether indorsements by the *obligee* can be admitted in favour of his personal representative, in an action against the obligor, is a very different question, and requires consideration. The general principle certainly is, that a person cannot make evidence for himself: what he says or writes for himself cannot be evidence in support of his right, and consequently cannot be evidence for his representative claiming in his right or place; what a party has said or done may be evidence against himself, but it can only be admitted to restrain, not to advance his interest. (5) And although there are a variety of cases, in which written entries by persons against their interest have been admitted after their decease as evidence of the fact there stated, (as will appear afterwards,

(1) 1 Burr. 434. Cowp. 109.
(2) 1 T. R. 271, 272. 4 Burr. 1963. Colsel v. Budd, 1 Campb. 27.
(3) 1 T. R. 270.
(4) As in Newman v. Newman, 1 Starkie, 101., where the obligee had resided abroad for the last twenty years.
(5) 2 Ves. 42, 43. 5 T. R. 123.

when the subject of hearsay is treated of,) it is to be observed, that in those cases the entries have been received in evidence, not in favour of the persons who made them, nor for their representatives, but on the part of third persons who had no concern whatever in making them. There must, therefore, be some special circumstances in the case to form an exception to the general rule, and to render such indorsements admissible.

The case of Searle v. Lord Barrington (1) is the earliest reported case, that can be found after a careful search, in which the effect of indorsements in the handwriting of the *obligee* appears to have been considered. This was an action on a bond, brought by the plaintiff as administratrix of her deceased husband (the obligee) against the defendant as administrator of the obligor. The defendant pleaded *solvit ad diem*, and insisted on the length of time, that had elapsed between the date of the bond and the commencement of the action, which was about twenty-seven years, as raising a presumption, that the money had been paid; in answer to this, the plaintiff offered in evidence two indorsements on the bond (2), in the handwriting of the obligee, one dated in December 1699, the other in March 1707., purporting that the whole of the interest had been paid up to the time of these dates. The Ch. Justice Pratt, before whom the action was first tried, rejected the evidence (3), on account of the inconvenience which would arise from allowing the obligee, in whose custody the bond always remains, to make such indorsements whenever he thinks proper. The plaintiff was accordingly non-suited. But after an argument in the Court of King's Bench, on a case stated for the opinion

(1) 2 Str. 826. 8 Mod. 279. S. C. 2 Ld. Raym. 1370. S. C. 3 Brown, P. C. 593. S. C. The dates will be found to be as follow: — The bond was dated in June 1697; the obligor died in 1710, the plaintiff's letters of administration were obtained in July 1723; the first action was tried before Pratt C. J. in 1724; the second action before Raymond C. J. in 1726. The writ of error in the Exchequer Chamber was in 1729; and the judgment of the Exchequer Chamber was affirmed on appeal to the House of Lords in 1730. (See the Reports in Strange and Brown.) The time of the *obligee's* death is not stated in any of the reports; but it appears that administration of his effects was sued out in 1723, which was about twenty-six years after the date of the bond.

(2) See 3 Brown, P. C. 593. and 2 Lord Raym. 1370.

(3) See the Reports in Strange, 8 Mod.

of that Court, the other three judges held (1), that the indorsements in question ought to have been left to the consideration of the jury; "for the jury (as the report in Strange states,) might have reason to believe it was done with the privity of the obligor: and the constant practice is for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement, than by taking a loose receipt." And the report in the 8th Mod. is full and strong to the same effect; "it is the daily practice (says that report) to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond, into whose hands soever it falls, as long as the original, which creates the charge, shall continue." The non-suit was not set aside, because at that time there was a prevailing notion, that as the plaintiff had been put out of Court by the non-suit, the Court could not order a new trial. The plaintiff afterwards brought a new action, which was tried before Lord Raymond; and the same indorsements were again offered in evidence, to repel the presumption of payment of the principal. The counsel for the defendant objected to the evidence (2), on the ground that it did not appear when those indorsements were made, otherwise than by the indorsements themselves. But Lord Raymond was of opinion, that the indorsments were evidence to be left to the consideration of the jury, and therefore allowed them to be read; and, other circumstantial evidence being given to induce the jury to believe that the bond had not been satisfied (3), the plaintiff had a verdict. The defendant's counsel tendered a bill of exceptions, which was sealed by the Chief Justice; and a writ of error was brought in the Exchequer Chamber. The errors were twice argued, in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed. (4) A writ of error

(1) See Rep. in Strange.
(2) See Report in Brown.
(3) See Brown's Report.
(4) According to the Report in Strange, five judges thought the evidence admissible, two were of the contrary opinion. The Report in Brown states, that the judgment was affirmed by the opinion of all the judges.

was then brought in the House of Lords; and after counsel had been heard on this writ of error, and the judges had delivered their opinions *seriatim*, the House of Lords affirmed the judgment of the Exchequer Chamber.

The grounds of the decision in the Exchequer Chamber, and in the House of Lords, do not appear in any of the reports. The reason given by the Court of King's Bench, on the argument after the first trial, has been before mentioned: the three judges, on that occasion, who were against the rejection of the evidence, adverted to the common practice of indorsements being made by the obligee, and were of opinion that the indorsements ought to have been left to the jury, who were to consider whether the indorsements were made with the privity of the obligor. There appears to have been no direct proof of the indorsements having been made at the time when they bore date, and this is mentioned as the ground of the objection. (1) If the obligee, by whom the indorsements were made, had died within twenty years after the date of the bond, this would have supplied direct evidence, at least, that the indorsements were made before the presumption of the payment of the principal could have arisen, and when it was against the interest of the obligee to make such indorsements, if the fact of the receipt of interest was untrue; and then, it might have been said, the jury would be warranted in concluding, that such indorsements, so made against the interest of the party, had been made with the privity of the obligor. But the death of the obligee is not stated in the reports; and, to judge from the course of the arguments in the court of King's Bench, as well as in the House of Lords, it seems not to have been proved. Nor is there any other direct proof of the indorsements having been made within twenty years. However, there is reason to believe, from the report in Brown's Parl. Cases, that circumstantial evidence of some kind was produced, confirmatory of the indorsements; that report stating, "the Chief Justice (Lord Raymond) being of opinion, that these indorsements were evidence to be left to the

(1) See the Report in Brown.

consideration of the jury, allowed them to be read; *and other circumstantial evidence being given, to induce the jury to believe the bond was not satisfied, there was a verdict for the plaintiff.*" And this is the view of the case which has generally been taken in explaining the principle and grounds of the decision. Lord Hardwicke, in the case of Glynn v. The Bank of England (1), where the case of Searle v. Lord Barrington was much observed upon, said, "he took it, in that case, the indorsements were made and bore date within twenty years." And the Lord Chief Justice Lee, in the case of Turner v. Crisp (2), which was about ten years after the judgment in the House of Lords, said, "the indorsement in the case of Searle v. Lord Barrington, appeared to be made before it could be thought necessary to be made use of to encounter the presumption." Lord Ellenborough also, in the case of Rose v. Bryant (3), after observing, that "he had been at a loss to see the principle, on which these receipts in the handwriting of the creditor had sometimes been admitted as evidence against the debtor," added, "I am of opinion, they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest."

The case of Searle v. Lord Barrington seems, therefore, at least, to have established this principle, (if the reports of that case are correct,) that indorsements by the obligee, purporting to be made within twenty years after the date of the bond, though not proved by direct evidence to have been made within that time, are yet admissible, to repel the presumption of payment, after the lapse of twenty years, and are proper to be left to the consideration of the jury, provided there are any circumstances in the case, to shew that the indorsements have been made before the presumption could arise.

An indorsement by the obligee, purporting that part of the principal sum has been received, if made after the presumption

(1) 2 Ves. 42. (2) 2 Stra. 827. (3) 2 Campb. 323.

of payment has arisen, is clearly inadmissible. (1) And further, if the defendant produces direct evidence of the payment of the principal sum and interest at a certain time within twenty years, the plaintiff cannot be allowed to encounter that evidence by an indorsement in the hand-writing of the obligee, purporting that interest was paid at a subsequent time (2); for, supposing the fact to be true, that the bond had been satisfied by payment, it would obviously be his interest to make such an indorsement, which might afterwards be used as evidence in an action upon the bond.

Release of quit-rent.

Although it may be presumed, that a bond has been satisfied after a forbearance for 20 years unexplained on the part of the obligee, yet it has been held, that, in the case of a quit-rent claimed by the lord of a manor, proof by the tenant, that no demand had been made upon him for near 40 years, was not a sufficient ground for presuming a release or extinguishment; and that no such presumption could be raised within less than 50 years, which is the period fixed by the statute of limitations. (3) A bond may be discharged by payment, and, on account of the difficulty of proving this fact after a length of time, it is reasonable to presume it without positive proof: but for the extinguishment of a quit-rent a deed is necessary, and it would be too much to presume, that the lord of a manor has executed such a deed, from the mere fact of his not having demanded payment of the quit-rent. "A presumption," said Mr. Justice Aston, "from mere length of time, which is to support a right, is very different from a presumption to defeat a right; here the presumption is to defeat the right of the lord to a small payment within the 50 years limited by the statute; and, therefore, upon mere length of time unaccompanied by other circumstances, such a limitation ought not to be altered, and another set up."

(1) Turner v. Crisp, 2 Str. 827. by Lee C. J.

(2) Rose v. Bryant, 2 Campb. 322.

(3) St. 32 H. 8. c. 2. s. 4. Eldridge v. Knott, Cowp. 214.

Pr. Ev. of property.

Possession is primâ facie evidence of property. Possession with an assertion of property, or even possession alone, gives the possessor such a property as will enable him to maintain an action of trover or trespass against a wrong-doer. (1) Thus, it has been held, that an agister of cattle may maintain trespass against a person for wrongfully taking them away. (2) And the principle applies to criminal as well as civil cases. On a prosecution for larceny, the property of the goods may be laid in the person who had possession at the time; and proof of the mere possession will support the indictment. This has been determined in the case of an agister of cattle (3), and in the case of a coachman, who drove the stage-coach by which the goods were sent. (4) So, (to give another example in a civil case,) in an action on a policy of insurance (5), the mere fact of possession of a ship by the plaintiff, as owner, is sufficient primâ facie evidence of ownership; and though it should appear on the cross-examination of one of the witnesses for the plaintiff, that the plaintiff derived his ownership under a bill of sale executed by the witness himself, it would not on that account become necessary for the plaintiff to produce that bill of sale. The proof of possession will be sufficient without the aid of any documentary proof, unless such further evidence is rendered necessary in consequence of some contrary proof on the other side.

Pr. Ev. of grants.

There are many cases, not within the statute of limitations, where courts of justice, from a principle of quieting possession, have held, that juries ought to presume the most solemn instruments to support a long uninterrupted possession. All shall be presumed to have been solemnly done, rather than ancient grants (which were necessary for the perfection of the thing) should be called in question, although the grants cannot now be shown. (6) Ancient possession would injure

(1) Armorie v. Delamirie, 1 Str. 505. Graham v. Peate, 1 East, 244. Sutton v. Buck, 2 Taunt. 302.

(2) 2 Roll. Abr. tit. Trespass, (M).

(3) Woodward's case, 2 East, P. C. 653.

(4) Deakin's case, 2 East, P.C. 653.

(5) Robertson v. French, 4 East, 130.

(6) 8 East, 263. Bedle v. Beard, 12 Rep. 5. Mayor of Kingston v. Horner, Cowp. 102. 3 T. R. 151. 158. 7 T. R. 492. Goodtitle dem. Parker v. Baldwin, 11 East, 488.

instead of strengthening a title, if, after a succession of ages and the decease of parties, objections should prevail, which might have been answered in the life-time of the parties, and which, if well founded, would most probably have been sooner made. (1) Charters and grants from the crown may be presumed, from great length of possession, not only in suits between private parties, but in some cases against the crown itself, if the crown were capable of making the grant. Thus, before the st. 9 G. 3. c. 16., Lord Mansfield C. J. held, that a possession and enjoyment for a hundred years were evidence in support of a title against the crown; for though such possession could not conclude as a positive bar, because there was no statute of limitation against the crown, yet it might operate against the crown as evidence of right in the defendant, if the claim could have a legal commencement. (2)

An endowment of a vicarage may be presumed from the long and continued possession of tithes and other profits. (3) So, long and uninterrupted usage will support a modus decimandi. It is evidence from which the jury may presume an agreement beyond time of memory, between the land-owners and all the parties, whose consent was necessary to give it effect. But such usage will not of itself be sufficient to support a modus *de non decimando*, claimed by a lay person against a spiritual rector; although it is certainly strong evidence of the right, when a legal foundation for such an exemption has been established. And though constant usage is evidence of a modus decimandi, and is a ground for presuming grants even against the crown; yet in the particular instance of a composition real in lieu of tithes, it is settled, that where the deed cannot be produced, some evidence must be given referring to the deed, or shewing that it did exist, independent of mere usage. (4) And the reason,

(1) See note (6) in preceding page.

(2) Case of the King against Brown, cited by Lord Mansfield, Cowp. 110. And see cases in preceding note.

(3) Crimes v. Smyth, 12 Rep. 4. 2 Gwill. 514. 716. 732.

(4) Knight v. Halsey, in error, 2 Bos. & Pull. 206. Bennet v. Neale, 1 Wightw. 324. Chatfield v. Fryer, 1 Price, 253. Ward v. Shepherd, 3 Price, 608. Bennett v. Skeffington, 1 Daniel's Rep 10. And see 1 Eden's Rep. 296.

why this has been so held, is stated to be, that, if it were otherwise, the church would be defrauded, and every bad modus turned into a good composition. "The presumption of a deed from long usage is for the furtherance of justice and for the sake of peace, when there has been a long exercise of an adverse right. For instance, it cannot be supposed, that any man would suffer his neighbour to obstruct the light of his windows and render his house uncomfortable, or to use a way with carts and carriages over his meadow for 20 years successively, unless some agreement had been made between the parties to that effect, of which the usage is evidence. But with respect to a composition for tithes, the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents: and there is no exercise of any adverse right, which is generally deemed necessary to raise the presumption." (1)

Upon the same principle, uninterrupted enjoyment of an easement for 20 years, or upwards is strong evidence of a right of enjoyment, from which juries are directed by the court to presume a conveyance or agreement; as, in an action on the case for obstructing the plaintiff's lights (2), or in the case of a market regularly kept above 20 years. (3) So, a faculty from the ordinary may be presumed from the long uninterrupted usage of a pew in a church, claimed as appurtenant to a messuage. (4) So, an adverse enjoyment of a way over another person's land for above 20 years is a strong ground for the jury to presume a grant, although about 26 years ago the way was extinguished by an award under an inclosure act. (5) If indeed the party had asserted his right

(1) See note (4), preceding page.

(2) Lewis v. Price, reported in Mr. Serjt. Williams's edit. of Saund. 2 vol. 175. *a*; Dongal v. Wilson, id. 175. *b*.; Darwin v. Upton, id. 3 T. R. 159.

(3) Holcroft v. Heel, 1 Bos. & Pul. 401.

(4) Rogers v. Brooks, 1 T. R. 431. (*a*) Griffith v. Matthews, 5 T. R. 296. 298.

(5) Campbell v. Wilson, 3 East, 294. 302. Keymer v. Summers, Bull. N. P. 74. Carr v. Heaton, 3 Gwill. 1262. As to a public right of way, by a presumed dereliction on the part of the owner of the soil, see the case of the Trustees of the Rugby Charity v. Merryweather, 11 East, 375. n. R. v. Lloyd, 1 Campb. 260. R. v. Barr, 4 Campb. 16. Woodyer v. Haddon, 5 Taunt. 125.

to be grounded on the award, this would shew that the way was used by mistake; but unless it could be clearly referred to something else besides adverse possession, the jury would probably be directed not to consider small circumstances as raising a presumption, that the possession arose otherwise than by grant.

Adverse possession for a shorter period than 20 years will not of itself afford a ground for such a presumption; and there ought to be some other evidence in support of the right. (1) However, a licence may be presumed within that time, though in general a grant cannot; as, in an action of ejectment to recover part of a waste inclosed by the defendant, where it was proved that the steward of the lord of the manor had from time to time seen the inclosure, which had been nearly thirteen years, without making any objection, this was held to be evidence from which the jury might presume a licence from the lord. (2)

In the cases which have been mentioned, the usage for twenty years was considered to be strong presumptive evidence of a grant or agreement. But it is only *presumptive* proof; and therefore evidence is admissible to repel such a presumption; as, by showing that the usage was limited, or modified, or bad in its commencement, or that it clearly originated in a mistake. (3) In the case of Darwin v. Upton (4), which has been cited, where the effect of this kind of evidence was much considered, Lord Mansfield said, "The enjoyment of lights with the defendant's acquiescence for twenty years is such decisive presumption of a right by grant or otherwise, that, unless contradicted or explained, the jury ought to believe it. But it is impossible that length of time can be said to be an *absolute bar* like a statute of limitation; it is certainly a *presumptive bar*, which ought to go to the

(1) 6 East. 215. 4 Burr. 1963. Cotterel v. Griffiths, 4 Esp. N. P. C. 69.

(2) Doe dem. Foley v. Wilson, 11 East, 56.

(3) 3 East, 300. 302. Dawson v. D. of Norfolk, 1 Price, 246.

(4) 2 Saund. 175. *c.*

jury." The other Judges also were strongly of the same opinion. In the case of Holcroft v. Heel, indeed (1), Ch. J. Eyre, who tried the cause, held, that an undisturbed possession of a market by the defendant for twenty-three years was a bar to an action brought by the plaintiff, the grantee of a neighbouring market, and therefore nonsuited the plaintiff; and the Court of Common Pleas seem, from the report, to have been of the same opinion. But this case has been since explained by a learned Judge, who was counsel in the cause (2); and it appears to have been the opinion of the Court, that the adverse possession was such strong evidence, that the Chief Justice ought to have left it to the jury to find a grant of the market from the crown; but as the court also intimated, that if the cause were to be tried again upon the same facts, the jury would be so directed, the plaintiff's counsel declined pressing for a new trial. This case, therefore, appears not to be inconsistent with the other authorities, which determine that such a continued possession is only presumptive evidence of a grant.

The usage, which is supposed to be founded on a grant or agreement, determines also the extent of the supposed grant. (3) The right granted is considered to be commensurate with the right enjoyed. A person who has enjoyed a limited right cannot lawfully enlarge it to the detriment of others; and, in case of such enlargement, those who are prejudiced may lawfully obstruct the use in the newly acquired part; but still he will be entitled to the enjoyment of his former right, not only to the same extent, but in the same specific manner. (4) So, if a person has a way for carriages from D. to B. over another man's close, and purchases land adjoining to B., he cannot use the way with carriages to the adjoining land, though he comes first to B. and so to the adjoining land; for this way may be prejudicial to the other person's close. (5) The con-

(1) 1 Bos. & Pull. 400. 6 East, 214.
(2) 3 East, 298. 302.
(3) 14 East, 339, 340.
(4) Chandler v. Thompson, 3 Campb. 80. And see Martin v. Goble, 1 Campb. 320. Bealey v. Shaw, 6 East, 208.
(5) Roll. Ab. 391. tit. Chimin, Art. 3. Laughton v. Ward, 1 Lutw. 111.

tinued use and enjoyment of a private way for carriages does not necessarily imply a right to use it as a drift-way, though the one has been often understood as including the other. (1) However, it has been held that the use of a carriage-way is evidence of a right of way for all kinds of cattle, more especially, if some species of cattle have been usually driven along the way; and that it will be a question for the jury to determine, from the nature and situation of the premises, and from other circumstances, whether it is more probable that the grant included both rights of way, or that one of them was excluded. (2)

The principle above stated must always be understood with this qualification, that the possession, from which the party would presume a grant of the easement, was with the knowledge of the person seised of an estate of inheritance. If a tenant for years or for life gives a licence to another to enjoy an easement on his lands for above twenty years without interruption, this will not affect the person in reversion or remainder; but, on the determination of the particular estate, he may dispute the right to the easement, and the length of possession will not be evidence against him to presume a grant, unless it can be shewn that he acquiesced. (3) So, where a person made windows in his house, and had them for above twenty years, without any interruption from the occupier of the opposite premises, who occupied them under a lease, the Court of King's Bench held, that the possession of such an easement would not affect the landlord on the determination of the lease, and that he would not be liable to an action for raising the height of his own premises, and thereby obstructing the light through the new windows. (4) "It is true," said Mr. Justice Le Blanc in this case, "that presumptions are sometimes made against the owners of land during the possession and by the acquiescence of their tenants, as in the instances of rights of way and of common; but that happens, because the tenant

(1) 1 Taunt. 284, 285.

(2) By Mansfield C. J. and Chambre J. in Ballard v. Dyson, 1 Taunt. 279.

(3) Bradbury v. Grinsel, 2 Saund. 175. *d.* in note.

(4) Daniel v. North, 11 East, 372.

suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of the landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake."

Pr. Ev. in criminal cases.

Presumptive, or circumstantial evidence, must obviously be as admissible in criminal prosecutions as in civil cases; for whether the proceeding be of a civil or criminal nature, the modes of reasoning, and of drawing conclusions from facts, must necessarily be the same. When direct evidence of facts cannot be supplied, as must continually happen in some of the worst species of crimes, reasonable minds will necessarily form their judgment on circumstances, and act on the probabilities of a case. The whole system of human action proceeds on probability. And "as mathematical or absolute certainty," (to use the words of Lord Mansfield in the Douglas cause) "is seldom to be attained in human affairs, reason and public utility require, that judges, and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of the probabilities on the one side or the other, whether the amount of these probabilities be expressed in words and arguments, or by figures and numbers." The principal difference to be remarked between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil, rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter case, which affects life and liberty. In criminal prosecutions, it has been observed (1), the circumstantial evidence should be such, as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. Doubtless, the circumstances ought to be of such a nature as not to be reasonably accounted for on the

(1) Burnet's Treatise on the Criminal Law of Scotland, 523.

supposition of the prisoner's innocence, but perfectly reconcileable with the supposition of his guilt.

Circumstantial evidence has, in some instances, undoubtedly been found to produce a much stronger assurance of the prisoner's guilt, than could have been produced by the most direct and positive testimony. (1) As a general principle, however, it is certainly true, that positive evidence of a fact from credible eye-witnesses is the most satisfactory that can be produced, and the universal feeling of mankind leans to this species of evidence in preference to that which is merely circumstantial. If positive evidence of a fact can be produced, circumstantial evidence ought not to be trusted. Chief Baron Gilbert, therefore, considers it a higher species of proof. He says, "when the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily or usually attend such facts; and which are called presumptions and not proofs, for they stand instead of the proofs of the fact, till the contrary be proved."

A difference between witnesses on points of little importance affords no reason to suspect their veracity. These variations in testimony occur every day in the transactions of common life, and may be explained on the commonest principle of human nature. Men relate facts, as they observe and remember them; and the powers of attention, observation, and memory, are infinitely diversified. A difference in the manner of relating unimportant circumstances is perfectly natural, and what might be expected in the ordinary course of things: on the contrary, it is the exact coincidence in minute particulars, that shows contrivance, and excites suspicion. An eminent writer, in adverting to differences in the narrative of the sacred writers, has made some very judicious observations on this subject, which are of universal application. (2) "If several independent witnesses of fair character," he says, "should agree in all

(1) A very remarkable case of circumstantial evidence is stated at length in Burnet's Treat. on the Criminal Law of Scotland, p. 524.

(2) The Bishop of Landaff's Apology, p. 79.

the parts of a story (in testifying, for instance, that a murder or a robbery was committed at a particular time, in a particular place, and by a certain individual), every court of justice in the world would admit the fact, notwithstanding the abstract possibility of the whole being false. Again, if several honest men should agree in saying that they saw the King of France beheaded, though they should disagree as to the figure of the guillotine, or the size of his executioner, as to the King's hands being bound or loose, as to his being composed or agitated in ascending the scaffold; yet every court of justice in the world would think, that such difference, respecting the circumstances of the fact, did not invalidate the evidence respecting the fact itself. It would be impossible to establish the truth of any fact, if a disagreement in the evidence of witnesses, in minute points, should be considered as annihilating the weight of their evidence in points of importance. In a word, the relation of a fact differs essentially from the demonstration of a theorem. If one step is left out, if one link in the chain of ideas constituting a demonstration is omitted, the conclusion will be destroyed; but a fact may be established, notwithstanding a disagreement of the witnesses respecting it in certain trifling particulars of their evidence."

On an indictment for larceny, proof that a part of the stolen goods have been found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of his having stolen them, so as to call upon him for his defence; and may be sufficient to convict him, if no facts appear in evidence to repel that presumption. The goods are sometimes found in the prisoner's house before his apprehension, frequently found afterwards; and there can be no objection to proof of their being found at one time or the other; scarcely an assize ever occurs, (as the court observed, in Watson's case (1), where a question of this kind was suggested,) in which it does not happen, that part of the evidence against a prisoner consists of proof, that the stolen property was found in his house after his apprehension. This kind of evidence is frequently strengthened

(1) 2 Starkie, 139.

materially by other circumstances, as by proof that about the time of the offence the prisoner was near the spot from which the goods were taken, or that he gave some false account respecting the goods on being charged with the crime, or endeavoured to conceal them, or perhaps tried to prevent an inspection, or by some other proof of suspicious circumstances in his behaviour. On the other hand, the inference, arising from the mere fact of possession, will be much weakened, if any considerable time has elapsed between the loss of the property and the finding of it again, or if the property was from its nature likely to pass in the interval through many hands; especially, where the prisoner betrayed no appearance of guilt at the time of his apprehension.

Presumption of law.

A presumption of fact is in some cases made a presumption of law. Thus in the law of treason, an intention to kill the king may be reasonably inferred from a conspiracy to seize his person and imprison him. "Experience has shown," says Mr. Justice Foster (1), "that the distance is very small between the prisons and the graves of princes." This is a presumption of fact. But it is fully settled by the best authorities, that such a conspiracy is in law an overt act of compassing the king's death, and in itself a substantive act of high treason within the statute of Edward the Third. The same observation applies to other acts, which have a less immediate and direct tendency to endanger the king's life, such as entering into measures in concert with foreigners in order to effect an invasion of the kingdom; this also is an overt act of compassing the king's death. "It is a presumption of fact so obvious and so undeniable, that the law has adopted it, and made it a presumption of law."(1)

On an indictment for the murder of a bastard child, the concealment of the death by the mother is a strong circumstance of suspicion against her, if the child is proved to have been born alive. But, unless that is proved, the mere fact of concealment is in its nature equivocal. However, by the statute

(1) Fost. 196.

of 21 J. 1. c. 27. the burthen of proof was cast upon the mother; and unless she proved the negative, namely, that the child was not born alive, that statute did in effect make the concealment conclusive evidence of the murder. This act has been since repealed by the statute 43 G. 3. c. 58. s. 3.; by which the endeavour to conceal the birth is subject to a lighter punishment.*

SECT. III.

Evidence is to be confined to the Points in Issue.

THE sole object and end of evidence is, to ascertain the truth of the several disputed facts or points in issue on the one side or on the other; and no evidence ought to be admitted to any other point.

Relevancy of proofs.

Evidence must always be considered with reference to the subject-matter, to which it is applied. And it is material, therefore, to consider the view, with which particular evidence is offered, in order to determine whether it bears upon the point in issue. Evidence may be admissible in one point of view, though not in another. A question, for instance, which would have been irrelevant and improper on the examination in chief, may be rendered necessary by the course of a cross-examination. In criminal cases, though it is not material, in general, to inquire into any other taking of goods, besides that specified in the indictment; yet, for the

* The 4th section enacts, "that it may be lawful for the jury, by whose verdict any prisoner, charged with such murder, shall be acquitted, to find, in case it shall so appear in evidence, that the prisoner was delivered of issue of her body, which if born alive would have been bastard, and that she did by secret burying or otherwise endeavour to conceal the birth thereof, and thereupon it shall be lawful for the Court to adjudge, that such prisoner shall be committed to the common gaol or house of correction for any time not exceeding two years." It has been determined by the opinion of all the Judges, that the prisoner may be found guilty of the concealment, whether charged with the murder by the coroner's inquisition or on a bill of indictment returned by the grand jury. See R. v. Cole, 3 Campb. 371.

purpose of ascertaining the identity of the person, it is often important to shew, that other goods, which had been upon an adjoining part of the premises, were taken in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. Thus also, on an indictment for the crimeof arson, it may be shewn, that property, which had been taken out o the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (1) To give one other instance: On an indictment against a county, for not repairing a public bridge, the defendants may shew, under the general issue, that the bridge had been repaired from time to time by private individuals; for one question is, whether the bridge is a public bridge; and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining, whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience. It is one medium of proof, to shew that the bridge has been repaired by individuals; though that alone would be of very little weight. (2)

Admissions on record.

As the jury are bound to try only the matter in issue between the parties, no evidence need be given to prove any points which are admitted on record, and none can be received to dispute an admission on the record. (3) Thus in an action for cutting down trees, if the plaintiff replies to the defendant's plea of soil and freehold, that the trees were his trees and freehold, &c., he thereby admits the plea of the defendant, and cannot dispute that he had the freehold of the soil. So if a tenant justifies for common, and the issue on the right of common is found for the demandant, the jury cannot find, that the tenant did not put in his cattle. for that is admitted. (4) So in an action of debt on award, where the defendant pleads *no such award*, the jury cannot find matters which make the award

(1) Richman's case, 2 East, P. C. 1035.

(2) R. v. the Inhabitants of Northamptonshire, 2 Maule & Selw. 262. See Lord Ellenborough's judgment.

(3) Bull. N. P. [298].

(4) Com. Dig. tit. Pleader, (S. 17.)

void, if they are not contained in the award itself. (1) If the defendant, in an action of covenant for not keeping premises in repair, plead performance, he admits, by refraining from the plea of non est factum, so much of the deed as is expanded on the record; but he admits no more; and if the plaintiff would avail himself of any other part of the deed, he must prove it in the common way by the attesting witness. (2)

The defendant's plea of *plenè administravit* admits that he is administrator, and he cannot afterwards dispute it in the same action. The plea of *not guilty* in an action for an assault upon a person described as the wife of the plaintiff, admits the marriage. The plea of *payment*, in an action of debt by the assignees of a bankrupt upon a bond, admits their title to sue as assignees (3); the general principle being, that a party, who puts himself upon one issue, admits all the rest. To give one other instance: If the defendant in an action of trespass justify the removing of the object, with which he is charged, as injurious to his property, and the plaintiff reply that the defendant removed it with unnecessary force, doing unnecessary damage, &c., this replication admits damage to a certain extent, such as would justify the defendant in removing the object, and therefore precludes the plaintiff from shewing that no damage had been done. (4)

With these general observations, we may now proceed to consider more closely the rule, which is the subject of this section, with reference to some of the issues in particular actions. It is not within the plan of the present volume to treat at length of the various issues in all the several forms of action; but our attention will be confined to a few only of such issues as come most commonly into practice. First, then, of the plea of *non assumpsit*; secondly, of the plea of *non est factum*; thirdly, of the plea of *not guilty*, in an action of trespass. After this, the next question, to be considered, will be, how

(1) 2 Roll. Abr. 692. l. 25.

(2) Williams v. Sills, 2 Campb. 519. For other examples, see Hill v. Wright, 2 Esp. N. P. C. 669. Watson v. King, 4 Campb. 272. Harrington v. M'Morris, 5 Taunt. 228.

(3) Corsbie v. Oliver, 1 Stark. 76.

(4) Pickering v. Rudd, 1 Stark. 58.

far evidence of *other* transactions between the same parties is admissible; whether customs may be proved, when similar to those in issue, but existing in other manors or parishes; as to the proof of *other* trespasses, *other* libels, and *other* slanderous words; and in what cases evidence of character can be received. The rule, under discussion, may then be considered with reference to criminal proceedings; and the section will conclude with some observations as to the effect of a judgment by default; payment of money into court; and lastly of bills of particulars.

Evidence under *non assumpsit.*

In an action of assumpsit, the defendant, under the general issue of non assumpsit, may give in evidence any thing which shews, that the plaintiff at the time of the commencement of the suit, had not a good cause of action, or that nothing is due (1), as, performance, or payment; or may shew a release (2), or accord and satisfaction (3), or discharge before breach (4), as a legal excuse for the non-performance; or that the contract was different from that stated (as, that it was made with the plaintiff and other persons not named in the action (5), or with one of the plaintiffs alone) (6): or may disaffirm the contract by shewing, that the plaintiff, who sues as a feme sole, was married at the time of the contract; or that the defendant, who is sued as a feme sole, was then married; or that the defendant, who is sued as a married woman, was at the time of the delivery of the goods married to another man, her first husband, who is still alive (7): or may avoid the contract by shewing that it was usurious (8), or founded on a gaming or other illegal transaction (9), or that the defendant was an infant at the time of making the promise (10), or that

(1) Bull. N. P 152. 4 Taunt. 165.

(2) Bull. N. P. ib. Hawley v. Peacock, 2 Campb. 558. 4 Taunt. 165. Miller v. Aris, 3 Esp. N. P. C. 234.

(3) Paramore v. Johnson, 1 Lord Raym. 566. 12 Mod. 376. S. C. Huxham v. Smith, 2 Campb. 19. So also in an action for slanderous words, Lane v. Applegate, 1 Starkie, 97.

(4) 12 Mod. 538. S. P. admitted 1 Mod. 262.

(5) Leglise v. Champante, 2 Str. 820.

(6) Wilsford v. Wood, 1 Esp. N. P. C 183. See, as to variance in proof of contract, post.

(7) Cowley v. Robertson and wife, 3 Campb. 438.

(8) 1 Str. 498. Bull. N. P. 152.

(9) 1 Ld. Raym. 89.

(10) 1 Salk. 279. Bull. N. P. 152. Gilb. Ev. 163. Howlett v. Haswell, 4 Campb. 118.

he was made to sign the supposed written agreement in such a state of intoxication, as not to know what he did. (1)

But the defendant cannot, under the plea of non assumpsit, shew any matter, that would not go to the gist of the action, but merely to discharge it, as the statute of limitations (2); and though it should appear on the face of the declaration, that the cause of action did not arise within six years before the commencement of the action, yet the defendant can only take advantage of this, by pleading the statute. Nor can the defendant shew a payment of the debt, after the action brought, and that the plaintiff gave him a receipt for the debt and also for costs in the action; except for the purpose of lowering the damages to mere nominal damages: but with this view, the evidence is admissible. (3) "The Court of King's Bench (said Ch. Justice Gibbs, in the case referred to) have suffered what has passed between suing out of the writ and filing the declaration to be given in evidence without pleading it. But the payment of the debt and costs, which arises after action brought, should be introduced by plea. The plaintiff, however, can only claim nominal damages."

The defendant will not be allowed to prove under the general issue, that the contract was not with himself alone, as stated in the declaration, but jointly with other persons (4); for proof that another contracted is not evidence that the defendant himself did not contract; and where several persons make a joint contract, each is liable for the whole, although the contract be joint. Such an objection can only avail, when the fact is pleaded in abatement. And although it should appear on the evidence produced on the part of the plaintiff, that other persons are liable as joint contractors with the defendant, this is no variance, and the plaintiff will be entitled to recover. (5)

(1) Pitt v. Smith, 3 Campb. 33.
(2) Bull. N. P. 152.
(3) Holland v. Jourdine, 1 Holt, 6.
(4) Rice v. Shute, 5 Burr. 2611. Abbott v. Smith, 2 Blac. Rep. 946. Cowp. 832. Richards v. Heather, 1 Barn. Ald. 29. Here the defendant was surviving partner, and though he was not so charged, the plaintiff recovered; and Spalding v. Mure, 6 T. R. 363, was overruled, as to this point.
(5) Germain v. Frederick, and Evans v. Lewis, 1 Saund. 291. *e. d.* in

Evidence under *non est factum.*

The rule which has been just laid down with respect to joint contracts, either written or by parol, applies also to the case of joint bonds. If an action is brought against one obligor alone, who pleads *non est factum*, the plaintiff may maintain his action, notwithstanding that there appears to be a joint obligor, on the production of the bond (1); and although the bond is declared upon as the joint bond of the defendant and two other persons, it will be sufficient to prove the execution by the defendant alone. (2) The plea of non est factum puts in issue, whether it be the defendant's deed at the time of pleading. It may therefore be proved, under this issue, that the party was incompetent to make a deed, or that the delivery of the writing was absolutely void as an execution; thus, it may be shewn, that the defendant was at the time of the delivery a lunatic (3); or that he was blind, or unlettered and unable to read, and that the deed was misread to him (4); or that he was made to sign it, when so drunk as not to know what he did (5); or that the defendant was a married woman. (6) Or it may be shown, that the deed was delivered to a stranger as an escrow on a condition not performed. (7) Or the defendant may take advantage of a material variance between those parts, which are set out on the record as parts of the deed, and the deed produced. (8) Thus, if any material part of the same integral covenant is omitted, which varies the sense and meaning of the other part declared on, proof of such variance will negative the fact of its being the deed of the defendant. (9)

note. The last case was an action against defendant as *drawer* of a bill, which appeared in evidence to have been drawn by him and another jointly. See also Mountstephen v. Brooke 1 Barn. & Ald. 224. which differs only in being an action against an *acceptor*.

(1) Whelpdale's case, 5 Rep. 119. Cabell v. Vaughan, 1 Saund. 291. Gaulton v. Chaliner, 1 Saund. 291. *f* note. South v. Tanner, 2 Taunt. 254.

(2) Middleton v. Sandford, 4 Campb. 34.—The bond, in this case, was the joint and several bond of the obligors, and an objection was taken on the ground of a variance, but overruled by Mr. Justice Dampier.

(3) Yates v. Boen, 2 Str. 1104.

(4) Thorowgood's case, 2 Rep. 9. Gilb. Ev. 145.

(5) Bull. N. P. 172. Pitt v. Smith, 3 Campb. 34.

(6) Anon. C. 12 Mod. 609. Lambert v. Atkins, 2 Campb. 272. Bull. N. P. 172. Gilb. Ev. 144.

(7) Whelpdale's case, 5 Rep. 119. *b.* Co. Lit. 36. *a.* Bull. N. P. 172. Stoytes v. Pearson, 4 Esp. N. P. C. 255.

(8) As to variances, see post. § 5

(9) 11 East, 636. by Lord Ellenborough.

For the same reason the defendant may show, that, after the delivery of the deed and before the time of bringing the action, the deed has been altered in a material point by the party, for whose benefit the deed was made, by some addition, or rasure, or interlineation, &c.; for then, at the time of pleading, it was not the defendant's deed, but absolutely void. (1) Formerly the rule was, that a material alteration would vitiate a deed, whether it had been made by the party himself, or by a stranger without his privity (2); but now, it seems, an alteration by a stranger, without the privity of the party, would not have such an effect. (3) It was resolved in Pigot's case (4), that if the obligee altered the deed, though in words not material, the deed is void; but if a stranger, without his privity, alter the deed in any point not material, it will not avoid the deed.

The defendant, under the general plea of non est factum, cannot prove payment, or give in evidence a release, or accord and satisfaction; and if the deed is merely voidable, (as, by reason of his infancy, or for duress of his person,) he may plead such matter, and so avoid the deed; but cannot give it in evidence under the plea of non est factum, for at the time of pleading it had not been avoided, and was his deed. (5) Even in cases, where it is enacted by the legislature that the deed shall be void, (as, by stat. 9 Ann. c. 14. s. 1. for gaming, by stat. 5, 6 Ed. 6. c. 16. s. 2, 3. for sale of office, by 12 Ann. st. 2. c. 12. s. 2. for simony, and by stat. 13 Eliz. c. 8. for usury,) the defendant cannot take advantage of this under the plea of non est factum, but ought to plead the special matter. (6) And it is a general rule, where the consideration of the deed is illegal, whether by statute or at common law, that the defendant may take advantage of it by pleading the special matter; but cannot give it in evidence under the plea of non est factum. (7)

(1) 5 Rep. 119. *b*. Pigot's case, 11 Rep. 27. Sheph. Touchst. 71. Powell v. Duff, 3 Campb. 181.

(2) Pigot's case, 11 Rep. 27. *a*.

(3) See Henfrey v. Bromley, 6 East, 311. 9 East, 351.

(4) 11 Rep. 27. Waugh v. Russell, 5 Taunt. 707. 710

(5) 5 Rep. 119. Com. Dig. tit. Pleader, 2 W. 18.

(6) See 5 Rep. 119.

(7) Collins v. Blantern, 2 Wils. 347. 352. Harmer v. Wright, 2 Stark. 35.

Evidence under plea of *not guilty*, in trespass.

In an action of trespass *quare clausum fregit*, evidence of title and of right of possession is admissible under the general issue; as, a demise from the owner of the land (1); or, that the plaintiff's interest in the premises, which he had occupied under the defendant, had expired (2): or the defendant may prove, that at the time of the supposed trespass the freehold and right of possession were in a third person, and that he entered by his command. (3) Such evidence falsifies the declaration, by shewing that the defendant did not break the close, as is stated in the declaration. (4) But the defendant, under this plea, cannot prove a licence from the plaintiff (5), or defect of the plaintiff's fences (6), or right of common (7), or right of way (8), or other easement. (9) A distinction in this respect has been made between an action of trespass, and an action on the case. Thus, in an action for disturbing the plaintiff's right of common, the defendant may prove, under the general issue, that he has a right to depasture his cattle on the same common; for the averment, that the plaintiff could not enjoy in so ample a manner as of right he ought, is part of the issue. (10) And in an action on the case for a nuisance, a licence from the plaintiff may be given in evidence under the general issue. (11)

Formerly the defendant could not have proved, under the general issue, that he entered to take a distress for a rent-charge (12); but this evidence is now admissible, by st. 11 G. 2. c. 19. s. 21., which enacts, that, in all actions of trespass or upon the case, brought against any person entitled to rents or services of any kind, or other person, relating to any entry by virtue of this act or otherwise, upon the premises chargeable

(1) Dodd v. Kyffin, 7 T. R. 354.
(2) Argent v. Durrant, 8 T. R 403.
(3) Diersley's case, 1 Leon. 301. 8 T. R. 403. Garr v. Fletcher, 2 Starkie, 71. The declarations of the owner, made after the trespass, are clearly not admissible, to shew authority given to the defendant. Ib.
(4) Gilb. Ev. 221.
(5) Gilb. Ev. 216. 2 T. R. 166. 168.
(6) Co. Lit. 283. *a*. Gilb. Ev. 216.
(7) Id.
(8) Gilb. Ev. 217. 220.
(9) Hawkins v. Wallis, 2 Wils. 173.
(10) Bennet v. Spinke, 1 Selw. N. P. 393.
(11) Winter v. Brockwell, 8 East, 308.
(12) Co. Lit. 283. *a*.

with such rents or services, or relating to any distress or seizure, sale, or disposal of any goods or chattels thereupon, it may be lawful for the defendant in such action to plead the general issue, and give the special matter in evidence.

In trespass for taking goods, the defendant may prove under the general issue, that he recovered in an action against the plaintiff, and that the goods in question were delivered to him in execution; or that they were given to him by a third person, to whom they belonged; for this is proof of title. Or he may prove that the goods were put into his custody as pound-keeper, and that as such he detained them; for a pound-keeper is obliged to take and keep whatever is brought to him: he receives no written authority, no warrant, as a gaoler does on the delivery of a prisoner into his custody, and who must therefore state the warrant in his justification, but is bound to impound the cattle at the peril of the person who brings them. (1)

Proof of other transactions.

Such evidence alone ought to be admitted, as in some manner bears upon the question at issue. An inquiry into other transactions, besides those immediately contested, may in some cases be entirely irrelevant. The relevancy of evidence must depend upon the nature and circumstances of the particular case; for all evidence is to be considered with reference to the subject-matter, to which it is applied. For instance, in an action against an acceptor of a bill of exchange, if the defence is that the acceptance is forged, it cannot be material to inquire, whether the person suspected of the forgery has forged the defendant's name to another acceptance. (2) Or where the question, between a landlord and his tenant, is, whether rent was payable quarterly or half-yearly, it must be obviously irrelevant to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due. (3) On the other hand, it may frequently be very

(1) Badkin v. Chancellor and others, Cowp. 476.

(2) Balutti v. Serani, Peake, N. P. C. 142. Viney v. Barrs, 1 Esp. N. P. C. [illegible].

(3) Carter v. Pryke, Peake, N. P. C. 94. For other examples, see Holcombe v. Hewson, 2 Campb. 391. Spencely v. De Willot, 7 East, 108.

proper, and in some cases absolutely necessary, to look beyond the transaction, which is the immediate subject of inquiry, into previous transactions, for the purpose of discovering the knowledge of the parties, their motives, or intentions.

The case of Hunter v. Gibson and Johnson (1), affords an instance of this kind. That was an action by an indorsee against the defendants, as acceptors of an instrument purporting to be a bill of exchange: a question arose on the third count, which stated the bill to be payable to bearer, under the following circumstances: It appeared in evidence, that the name of the person mentioned as payee was merely fictitious, but this fact was not known to the plaintiff; and for the purpose of shewing, that the defendants, at the time of their acceptance, either knew the name in the bill to be fictitious, or that the defendants had given authority to the drawer to draw the bill in question payable to a fictitious person, the plaintiff proposed to prove, that the defendants had given a general authority to the drawer to draw bills of exchange upon them, to be made payable to fictitious persons, and evidence to this effect was produced; the counsel for the defendants objected to this evidence, on the ground that it had no relation to the particular bill in question, and that the facts of any particular transaction could not legally be inferred from circumstances which applied wholly to other transactions. Lord Kenyon, who tried the cause, admitted the evidence; upon which, the counsel for the defendants tendered a bill of exceptions. The Court of King's Bench gave judgment for the defendant in error. A writ of error was then brought in the House of Lords; and the question on the admissibility of the evidence was referred to the Judges. On this question there was a division among the Judges; but the majority of them being of opinion, that the evidence ought to have been received and left to the jury, the judgment below was affirmed. (2)

(1) 2 H. Bl. 187. 288. 290. 295.

(2) See infra, as to the *proof of knowledge* in issuing counterfeit money.

Proof of customs in other manors, &c.

When a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not admissible evidence. (1) In the Duke of Somerset's case (1), Lord Ch. J. Raymond said, he had always looked upon it as a settled principle in the law, that the customs of one manor should not be given in evidence to explain the custom of another manor; for, if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same. And, in addition to this argument of inconvenience, the objection taken to the evidence in that case, namely, that it was inapplicable to the point in dispute, appears to be very strong; customs being different in different manors, and in their nature distinct. Unless therefore some connection or relation is proved to have existed between them, as by shewing that they were all formerly holden under the same lord, or that the one manor was anciently parcel of the other manor (2), such evidence is not admissible.

But several cases appear to have determined this point, that, where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage, which prevails in any of the other manors within the district. The first reported case of this kind is Champian v. Atkinson (3), where the question was, whether a general fine was due to an infant preceding lord during his minority: and the defendants were allowed to give in evidence upon the trial of this issue, that other adjoining manors had the same custom, not to pay to the lord before he attained his full age: and similar evidence was there said to have been received, on a question of copyhold tenure, between certain manors in Middlesex. On the authority of this case of Champian v. Atkin-

(1) D. of Somerset v. France, 1 Str. 661. Ruding v. Newell, 2 Str. 957. Furneaux v. Hutchins, Cowp. 807. By Buller, J. in Noble v. Kennoway, 2 Doug. 512. S. P.; by Wood, B. in Doe dem. Foster v. Sisson, 12 East, 63. S. P. 3 Gwill. 965. Erskine v. Ruffle.

(2) Moulin v. Dalison, Cro. Car. 484.

(3) 3 Keb. 90, on Tr. at bar.

son, the Duke of Somerset's case (1) was principally decided. On a trial at bar in that case, where the issue was, whether a general fine was due from the tenants of certain manors in Cumberland to the Duke as next admitting lord, the Court after much argument admitted evidence, that the same fines had been paid in similar cases to the lords of other manors. Lord Ch. J. Raymond and Reynolds J. laid down the general rule as above stated, and were strongly against admitting the evidence; but afterwards agreed to receive it, on the authority of the precedent in Keble, and of cases said to have been so ruled on the northern circuit. Fortescue J., the only other Judge present, thought the evidence admissible, and made a distinction between the *custom* and the *tenure* of a manor; and as the question, there to be tried, merely concerned the tenure of the plaintiff's manors, he was of opinion that it would be proper to inquire, what were the qualities that attended other estates holden by the same tenure. So, in the case of Furneaux v. Hutchins, on a question relative to the custom of tithing (2), Lord Mansfield, after laying down the general rule that "proof of the custom in one parish is not evidence to affect another parish," adds this qualification, "unless the custom is laid as a general custom of the country." Thus, where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another. (3) It is evidence of a custom pervading one common district of manors.

In the cases which have been cited, proof of a general right over one entire district was admitted to explain and affect the rights of different persons in different parts. Upon the same principle, the late case of Sir Thomas Stanley v. White (4) was determined. This was an action of trespass for cutting

(1) D. of Somerset v. France, 1 Str. 658. See also Lowther v. Raw and others, Fortesc. 44. 55. S. P., on appeal to the H. of Lords from the judgment of Lord Talbot, Ch.; Dean and Chapter of Ely v. Warren, 2 Atk. 189. S. P. See also Cowp. 807, 808.; 5 T. R. 31.; and 1 Maule & Sel. 662.

(2) Cowp. 808.

(3) 1 Maule & Sel. 662.

(4) 14 East, 332. Bryan v. Winwood, 1 Taunt. 208.

down the plaintiff's trees; the defendant pleaded his soil and freehold in the close, upon which the trees were growing, &c.: the plaintiff replied, that the trees were his trees and freehold. It appeared on the trial, that the trees in question grew in a woody belt, of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership, in different parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining land. And the Court of King's Bench afterwards, on a motion for a new trial, adjudged the evidence to have been properly admitted, as evidence of the general right through the whole extent of the inclosure.

The general rule, then, is, that a custom of tithing, &c. in one parish, is not evidence of a custom in another. So, in an action by a rector for tithes, where the point in issue is, whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, the defendant will not, in general, be allowed to inquire, whether other farms in the same township are not subject to the same payment. Such an inquiry, however, may be very proper on the other side, in cross-examination, for the purpose of shewing that such payments cannot be a modus, consistently with the evidence which has been previously adduced. This was lately adjudged to be admissible in the case of Blundell v. Howard.(1) The question there was not put by the defendant with a view of supporting the modus set up by him; but was put by the plaintiffs, in order to shew that this and similar payments by the occupiers of different tenements were merely portions of a sum in gross paid throughout the township by way of composition, and could not be a modus, since the ecclesiastical surveys, which had been produced on the part of the rector, were entirely silent as to any modus co-extensive with the township.

(1) 1 Maule & Sel. 292.

Proof of other trespasses, &c.

In trespass for taking goods, the plaintiff can only prove the taking of such goods as are mentioned in the declaration. And in trespass for assault and battery, or *quare clausum fregit*, where the declaration charges, that the defendant on a certain day, and on divers other days between that day and the commencement of the suit, assaulted, &c. the plaintiff may prove any number of trespasses within those limits; or he may prove a trespass beyond the remotest day, waving all the rest. (1) And even after proving several assaults within the days mentioned in the declaration, perhaps he would be allowed to give evidence of assaults committed before that time, as proof of the defendant's malice. So, in an action for criminal conversation, the plaintiff may prove several acts of adultery within the times specified; and in addition to this, he may shew indecent familiarities antecedent to the first-mentioned day, though he cannot shew a previous criminal connection. (2) Such evidence is admissible to explain the nature of the intimacy, that subsisted between the parties.

Proof of other libels, &c.

In an action for slander, the plaintiff, after proving the words as laid in the declaration, may prove also, that the defendant spoke other actionable words on the same subject, either before or afterwards (3), or that he published other libels on the same subject, or other copies of the same libel. (4) This evidence is admissible, not in aggravation of damages, but for the purpose of proving the defendant's malice in deliberately publishing or speaking the words, which are the subject of the action. For this reason, in a late case, where the intention of the defendant, in publishing the libel, was not in any degree equivocal, Lord Ellenborough refused to admit evidence of the publication of other libellous papers, subsequent to that which was the subject of the action. (5) The distinction, which was at one time made between words

(1) Bull. N. P. 86.
(2) D. of Norfolk v. Germaine, 8 St. Tr. 6.
(3) Charlter v. Barrett, Peake, N. P. C. 22. Rustell v. Macquister, 1 Campb. 49. Tate v. Humphrey, 2 Campb 73. (*b*) Plunkett v. Cobbett, Holt on Lib. 2d. ed. 292. 2 Selw. N. P. C. 938. S. C.
(4) R. v. Pearce, Peake, N. P. C. 74. Lee v. Huson, Peake, N. P. C. 166. Plunkett v. Cobbett, 5 Esp. N. P. C. 136.
(5) Stuart v. Lovell, 2 Starkie, 93.

actionable and such as are not actionable, (that, in the latter case other words might be given in evidence, but not in the former,) (1) has been since properly overruled. (2)

In the last case on this subject, Finnerty v. Tipper (3), which was an action for a libel published in a periodical work, Mansfield C. J. refused to admit in evidence subsequent numbers of the same work, unless they expressly referred to the libel, for which the action was brought; for the subsequent publication, he said, might contain the most scandalous imputations, while the former libel may have been almost nothing; and the necessary consequence must be, that the jury would give damages for the second libel in an action for the first, although the defendant would not have the same opportunity of proving the truth of its contents, as if it were made the subject of a distinct action. The Chief Justice was of opinion, that the same restriction was proper, and had been observed, in actions for words spoken, namely, that the subsequent words ought to refer to the same subject*; and he drew a distinction between the case then before him and that of Carr v. Hood, which had been cited for the admissibility of the evidence; the defence there was, that the publication in question was fair criticism on the writings of the plaintiff, and therefore any other papers published by the defendant, to shew that he was actuated by malice in publishing the libel complained of, were certainly admissible evidence.

And as it may be proved on the one side, that the defendant published other distinct papers on the same subject, or other libellous passages in the paper which is the subject of the pro-

(1) Mead v. Daubigny, Peake, N. P. C. 125.

(2) Rustell v. Macquister, 1 Camp. 49. And see cases cited above.

(3) 2 Campb. 72.

* On a review of the cases, which have been above cited, it will be found that in all of them except two, namely, Lee v. Huson and Rustell v. Macquister, the subsequent words or libels, offered in evidence, expressly referred to those which were the subject of the action; and in those two cases it does not appear from the reports, whether they had, or had not, such a reference.

secution, as shewing that he acted deliberately, and from the motives imputed to him; so, on the other hand, the defendant will be allowed, in vindication of his motives, to give in evidence any parts of the same paper, that treat of the same topic as the supposed libel, and are fairly connected with it. These passages may be so far distant and so disjoined by other matter, and introduced in such a questionable shape, as to have scarcely any material bearing on the paragraph in question; or from their position and context they may be considered as forming parts of the same discussion, and entitled to the greatest weight. Under all circumstances, passages of the same paper, tending to shew the intention and mind of the defendant with respect to a specific paragraph, are material for the consideration of a jury. (1)

Evidence of character.

As evidence is to be confined to the points in issue, the character of either party cannot be enquired into, in a civil suit, unless it is put in issue by the nature of the proceeding itself. (2) Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, witnesses cannot be examined to the defendant's good character. (3) So, on the trial of an information against the defendant for keeping false weights, where it was proposed to call witnesses on behalf of his character, Eyre C. B. ruled that such evidence was not admissible in a civil suit. (4) "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but, where the prosecution is not directly for the crime but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws."

1. In action for crim. con.

In an action for criminal conversation with the plaintiff's

(1) R. v. Lambert and Perry, 2 Campb. 398.

(2) Bull. N. P. [298.]

(3) Goodright dem. Farr v. Hicks, Bull. N. P. 296.

(4) Attorney-General v. Bowman, 2 Bos. & Pull, 532. (a)

wife, evidence may be given of the wife's general bad character for want of chastity, or of particular acts of adultery committed by her before she became acquainted with the defendant. (1) This evidence is properly allowed in mitigation of damages, which ought to be proportionate to the amount of the loss sustained. And it may be proved, in mitigation of damages, that the plaintiff himself has carried on a criminal conversation with other women (2); or that the plaintiff's wife made the first advances to the defendant. (3) Witnesses are not to be examined as to the general good character of the plaintiff's wife, unless it has been attacked on the other side. (4)

2. In action for slander.

In an action for slander, it has been said, the plaintiff's character is in some degree put in issue, and therefore evidence of antecedent good conduct, has been thought admissible. (5) But, at the furthest, such evidence is to be confined to general character; and witnesses are not to be examined as to particular facts, for the purpose of falsifying the assertions in the alleged libel, where there is no justification on the record. Lord Ellenborough, in the case of Stuart v. Lovell (6), would not allow such an examination, being of opinion, that he could no more hear a falsification on the one side, than a justification on the other. The defendant, in this action, cannot, under the general issue, prove the crime which is imputed to

(1) Coote v. Berty, 12 Mod. 232. Bull. N. P. 27. 296. Roberts v. Mulston, MS. case in Selw. N. P. 25. As to proof of general bad character, see Foulkes v. Selway, 3 Esp. N. P. C. 236.

(2) Bull. N. P. 27. Duberley v. Gunning, 4 T. R. 658. Bromley v. Wallace, 4 Esp. N. P. C. 237. Lord Kenyon, in two cases, (Wyndham v. Ld. Wycomb, 4 Esp. N. P. C. 16., and another case there cited,) held such proof to be a bar to the plaintiff's action. But now this is not so considered.

(3) Elsam v. Fawcett, 2 Esp. N. P. C. 562. Gardiner v. Jadis, MS. case in Selw. N. P. 25.

(4) In Bamfield v. Massey, 1 Campb. 460., an action for the seduction of the plaintiff's daughter it was proved, that she had been connected with another man, before her acquaintance with the defendant, and in answer to this the counsel for the plaintiff proposed to examine witnesses as to her general character for chastity; but Ld. Ellenborough ruled, that they could not go into such an examination, as no evidence of general bad character had been offered, and that they were restricted to disproving the specific breach of chastity alleged on the part of the defendant. See also Dodd v. Norris, 3 Campb. 519. These cases carried the rule much further than is advanced in the text.

(5) King v. Waring, 5 Esp. N. P. C. 13. by Lord Alvanley.

(6) 2 Starkie, N. P. C. 94.

the plaintiff (1); but he has been allowed, in many cases, to give evidence of the plaintiff's general character, in mitigation of damages. Thus, where the libel imputed a crime to the plaintiff, in consequence of which he complained of having lost the society of his acquaintance, the defendant on the general issue has been allowed to shew, that, before and at the time of the publication of the supposed libel, the plaintiff was generally suspected of the crime imputed to him, and that on account of this suspicion his acquaintance had ceased to associate with him. (2) This evidence, upon general principles, is clearly admissible in mitigation, since a person of disparaged fame is not entitled to the same measure of damages, as another whose character is unblemished; and besides, in this particular case, the evidence disproved the averment, that the plaintiff had always preserved a good character in society, from which he had been driven by the insinuations in the libel. (3) Such evidence however is not admissible, where the defendant by his plea puts in issue the truth of the charge imputed. (4) In an action for a libel, it may be proved also, in mitigation of damages, that the plaintiff has been in the habit of libelling the defendant. (5)

3. In action for malicious prosecution.

In an action for a malicious prosecution, Lord Kenyon allowed the defendant's counsel, after proving circumstances of suspicion against the plaintiff, to inquire as to the plaintiff's general bad character, in order to shew that the defendant had probable cause for instituting the prosecution; but added, that they could not inquire into particular facts, with a view to reflect on his character. (6)

(1) Underwood v. Parkes, 2 Str. 1200. The C. J. there said, it had been so ruled by a large majority of Judges. And see 2 Bos. & Pull. 225. n. (a)

(2) Lord Leicester v. Walter, 2 Campb. 251.; and three other cases there cited by counsel, S. P. and—— v. Moor, 1 Maul. & Sel. 284.

(3) 1 Maul. & Sel. 286. 2 Campb. 254.

(4) Snowdon v. Smith, ruled by Chambre J. 1 Maule & Sel. 286. (a) But in Kirkman v. Oxley, an action for words charging the plaintiff with a larceny, Heath J. allowed the defendant, who had justified, to give evidence of the plaintiff's general bad character in mitigation of damages. Lincoln Sum. Ass. 1815.

(5) Finnerty v. Tipper, 2 Campb. 77.

(6) Rodriguez v. Tadmire, 2 Esp. N. P. C. 720. In a similar case, Mr. Baron Wood held, that the defendant's counsel could not inquire,

4. On indictment for rape.

On the trial of an indictment for a rape, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency, or that she had before been criminally connected with the prisoner: but it cannot be shewn, that she had a criminal connection with other persons. (1) And, on an indictment for an assault with intent to commit a rape, general evidence of the woman's bad character, previous to the supposed offence, is clearly admissible; but evidence of particular facts, to impeach her chastity, cannot be received in this case more than in the last, not even for the purpose of contradicting her answers in cross-examination. (2) Her answers to questions, respecting particular facts, not involved in the issue, are conclusive. And if on cross-examination she admit her own misconduct in some earlier transactions, it would be proper, on re-examination, to inquire into her conduct subsequent to such transactions, for the purpose of restoring her credit; other witnesses may also be called, to shew that she has since retrieved her character. (3)

5. Evidence of prisoner's character.

In trials for felony and high treason, and in trials also for misdemeanors (where the direct object of the prosecution is to punish the offence), the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, such evidence will be entitled to great weight. The enquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the nature of the charge against him. On a charge of stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of enquiry;

whether the plaintiff was a person of suspicious character. Newsom v. Carr, 2 Starkie, 69.

(1) Hodgson's case, by a majority of the Judges on a case reserved. 1812. MS.

(2) R. v. Clarke, 2 Starkie, N. P. C. 243. by Mr. Justice Holroyd.

(3) Ib. 242.

it would not afford the least presumption, that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question. The enquiry must also be as to the *general* character; for it is general character alone, which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation up to a certain period, would not then begin to act a dishonest unworthy part. What, then, is evidence of general character? One medium of proof, is by shewing how the person stands in general estimation; proof that he is reputed to be honest, is evidence of his character for honesty, and the species of evidence most commonly resorted to in such inquiries. It frequently occurs that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience of his honesty; and this statement is admitted, rather from favour to the prisoner, than strictly as evidence of general character. In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, expressions of good will and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as shewing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes.

On trials for high treason, where the guilt is in the traitorous intent, an inquiry has often been allowed into the conduct and sentiments of the prisoner on particular occasions; but still, with reference to the overt-acts charged in the indictment, and to the transactions which are proved against him. In Hardy's case (1), this subject underwent considerable discussion. The question there put to the witness was this; whether, from his personal acquaintance with the prisoner, he had ever heard him state, what was his plan of reform. This question was objected to. The overt-act charged was, that the prisoner, for the purpose of accomplishing the treason of

(1) 24 Howell's State Trials, 1065—1093.

compassing the king's death, did conspire with others to call a convention of the people, in order that the convention might depose the king; and the counsel for the prisoner submitted, that for the purpose of shewing that the convention was consented to be held, not with the design imputed by the indictment, but with an innocent design, they might go into evidence of what the prisoner had at other times declared, inasmuch as the counsel for the prosecution had gone into all that the prisoner had at any part of his life declared touching this fact, and had gone also into evidence of what other members of the corresponding societies had said. They then defended the question by an able argument, in the course of which several cases were cited from the State Trials; particularly the case of Lord Russell, the one which came nearest in principle to that under discussion, where the charge against the prisoner was for compassing the king's death, and the overt-act was, consulting to raise rebellion and seize the king's guards; and Lord Russell in his defence called many witnesses to speak to his affection towards the government and his detestation of risings against it; some of the witnesses gave evidence of his conversations and sentiments on this subject, shewing his aversion to all risings of the people: Dr. Burnet and Dr. Cox, in particular, spoke fully to this point, and without any objection either from the court or from the counsel for the prosecution. After the question, in Hardy's case, had been argued at some length, Lord Ch. J. Eyre is reported to have thus addressed himself to the prisoner's counsel, (1) " I do not know, whether you can be content to acquiesce in the opinion, that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear, as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption, upon which declarations are evidence, is, that no man would declare any thing against himself, unless it were true; but that every man, if he were in difficulty, or in the view to any diffi-

(1) St. Tr. 1094.

culty, would make declarations for himself. Those declarations, if offered as evidence, would be offered, therefore, upon no ground which entitles them to credit. That is the general rule. But if the question be, what was the political speculative opinion, which this man entertained touching a reform of parliament, I believe we all think, that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place."(1) The question. afterwards put to the witness, was, whether before the time of the convention, which was imputed to the prisoner, he had ever heard from him what his objects were, whether he had at all mixed himself in that business; and, in answer, the witness stated what he had heard from the prisoner respecting his plan of reform. (2) In the case of Walker and others (3), who were tried for a conspiracy to overthrow the government, and the evidence was, that the conspiracy existed and was brought into overt-act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness, whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject. The question was opposed, but held by Mr. Justice Heath to be admissible. They were allowed also to inquire into the general declarations of the prisoner at those meetings, whether the witness had heard him say any thing that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession.

The rule, that all manner of evidence ought to be rejected, which is foreign to the points in issue, applies more strongly, if possible, to criminal prosecutions than to civil cases. This rule Rule in criminal cases.

(1) As to the extent of this rule, to conversations "*at any time*," however remote; see infra, p. 196.

(2) 24 Howell's St. Trials, p. 1097. Another question, which the report states to have been put by the prisoner's counsel to one of the witnesses, was, as to what the prisoner had declared to be the object of the corresponding societies; this was not opposed, and seems to have been admitted by the Court to be correct. See p. 1101.

(3) Ib. p. 1131.

is founded in common justice; for no person can be expected to answer, unprepared and at once, for every action of his life. In treason, therefore, no evidence is to be admitted of any overt act that is not expressly laid in the indictment. This was the rule at common law; and it is again prescribed and enforced by the statute of W. 3., which contains an express provision to that effect (1), in consequence of some encroachments that had been made in several state-prosecutions. (2) The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it conduce to the proof of any of the overt acts which are laid, it may be brought as evidence of such overt acts. (3) With this view, the declarations of the prisoner, and seditious language used by him, are clearly admissible in evidence, as explaining his conduct, and shewing the nature and object of the conspiracy. (4) And acts of treason, tending to prove the overt acts charged, though committed in a foreign country, may be given in evidence. (5)

On the trial of an indictment for burglary and larceny (6), it appeared upon the evidence, that the prisoners might have entered the house before it was dark, and that they had not taken any part of the goods at the time when they were discovered in the house; upon which, the counsel for the prosecution proposed to give evidence of a larceny in the house committed by the prisoners on a preceding day; but the Court rejected the evidence, on the ground that it tended to prove a felony of a totally distinct kind; the prisoners were, therefore, acquitted on this charge, but

(1) 7 W. 3. c. 3. s. 8.

(2) Foster, 245, 6.

(3) Id. 9. 246. Vaughan's case, 5 St. Tr. 2. Deacon's case, 9 St. Tr. 8. 1 Campb. 400.

(4) R. v. Watson, 2 Starkie, 134. So on an indictment for sending a threatening letter, a subsequent letter from the prisoner, explanatory of that stated on the record, is admissible. Robinson's case, 2 East. P. C. 1112.

(5) Fost. 10. Deacon's case, 9 St. Tr. 8.

(6) R. v. Vandercomb and Abbott, 2 Leach, Cr. C. 816.

afterwards indicted again for the other offence and convicted.

It would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be received in evidence.(1) But on an indictment for uttering a bank-note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is clearly admissible, as shewing that he knew the note in question to be forged (2); and on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is evidence of his having known, that the money which he uttered was counterfeit. (3) Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge: and it would seldom be possible to ascertain, under what circumstances the uttering took place, whether from ignorance, or with an intention to commit a fraud, without inquiring into the demeanour of the prisoner in the course of other transactions. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment; and the question then would be, whether the evidence is sufficient to warrant the inference of knowledge at one time, from such particular transactions at another time. (4) That is a question entirely for the jury. But whatever weight the evidence may have, (which is quite another consideration,) it is clearly admissible; not as evidence of another offence, but simply of another transaction, in which the prisoner was engaged.

(1) R. v. Cole, Mich. term. 1810, by all the Judges, MS.

(2) R. v. Wylie, 1 New. Rep. 92. R. v. Ball, 1 Campb. 321.

(3) 1 New. Rep. 92.

(4) Id. 94.

On an indictment against several prisoners, for a conspiracy to carry on the business of common cheats, proof is admissible, that the prisoners at a different time made similar representations to other tradesmen besides those named on the record (1): cumulative instances are necessary to prove the offence; the same sort of evidence is allowed in an indictment for barratry, and, as before mentioned, in prosecutions for the greatest of all offences, high treason. The same kind of proof is constantly admitted in trials for murder; in which, former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased.

The plea of not guilty puts in issue all the material parts of the indictment; and under this plea the prisoner may give in evidence any matter of justification, excuse, or extenuation. And if some other acts of the prisoner, besides those which are the subject of the indictment, are proved against him for the purpose of shewing his design in the affair in question, he will be allowed to explain those parts of his conduct, and with this view may give in evidence other contemporaneous particulars of his conduct, which shew that he had a different design from that imputed to him. This limitation (namely, that the particulars offered in evidence by the prisoner ought to be contemporaneous with those proved on the other side, or at least confined within the same limits, to which the evidence on the part of the prosecution is subject) appears to be not unreasonable; for otherwise the prisoner would be at liberty to take the whole range of his life, in the course of which his character and his designs may have undergone a complete change. This observation, however, is made with great deference; as the rule certainly appears to have been carried much further in one of the modern state trials, in the case of Horne Tooke. (2) In that case, several publications were given in evidence, on the part of the crown, containing republican opinions, which had been distributed by the prisoner

(1) R. v. Roberts, 1 Campb. 400.

(2) 1 East, P. C. 61. Gurney's Report, 2 vol. 36. S. C. Howell's St. Tr. vol. 25. 545. S. C. See the observation on this point, in R. v. Lambert and Perry, 2 Campb. 400. See also Ld. G. Gordon's case, 21 Howell's St. Tr. 542.

during the period assigned in the indictment for the existence of the conspiracy; and this evidence was much relied on, as shewing that the notion of a reform, which was expected to be set up by the prisoner in his defence, was a mere pretext to cover his treasonable designs: to repel this conclusion, the counsel for the prisoner offered in evidence a book, which had been written by the prisoner twelve years before, on the subject of parliamentary reform; the evidence was objected to, as having no relation with the particular transaction in question, and because the prisoner's opinions, whatever they were formerly, might have afterwards changed. But Lord Ch. J. Eyre said, that the question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge; and he thought it evidence to rebut the supposition, that the reform of parliament was a pretence made by the prisoner. The book was accordingly received in evidence.

The rule, which is now the subject of discussion, will be further illustrated by considering the effect of judgments by default, of the payment of money into court, and of particulars of demand under a Judge's order.

Judgment by default.

First, as to judgments by default. — A judgment by default is an admission of the cause of action. Thus in an action on a bill of exchange against the defendant as acceptor, it admits that he accepted it, and that the bill is as stated in the declaration; and he cannot afterwards shew on the execution of a writ of inquiry, that he had not accepted it(1); the only use in producing the bill is, for the purpose of seeing whether there is any indorsement upon it, of money having been paid. (2) So in an action for goods sold and delivered, or for money had and received, the defendant, by suffering judgment to go by default, admits that something is due; and he cannot afterwards dispute the contract of sale,

(1) Green v. Hearne, 3 T. R. 301. Bevis v. Lindfell, 2 Str. 1149.
(2) 3 T. R. 302. Billers v. Bowles, Barnes Rep. Ellis v. Wall, ib. Bayley on Bills 227; and Mills v. Lyne, MS. case there cited.

or shew fraud on the part of the plaintiff in making the contract (1); but the plaintiff will only have to prove the amount due to him. So on the execution of a writ of enquiry after judgment on demurrer, the defendant cannot controvert any thing but the amount of the sum in demand: as, in an action for goods sold and delivered, to which the defendant pleaded coverture, and the plaintiff replied, that the defendant's husband had resided abroad, and that the defendant, during all the time, &c. had carried on trade as a feme sole, the Court were of opinion, that, after judgment on demurrer to this replication, evidence of the wife having acted as agent to the husband ought not to have been admitted on the execution of the writ of enquiry: that the only question, to be decided by the jury, was on the amount of the debt, and that the question, whether the debt had been contracted by the defendant as agent for her husband, or in her separate capacity, ought to have been considered as determined by the record. (2) After judgment by default of a co-defendant, the plaintiff cannot be nonsuited as to the other defendant; but if the plaintiff fail to make out his case, the other defendant must have a verdict. (3)

Payment of money into court.

Secondly, as to payment of money into court.—Such payment is in general an acknowledgment of the right of action to the amount of the particular sum. (4) And as it is an acknowledgment on record, the party cannot recover it back, although he has paid it wrongfully or by mistake. (5) It is an admission by the defendant, that the plaintiff has a legal demand to a certain extent; but it is not an acknowledgment beyond that amount, and will not preclude the defendant from taking any objection to the action with respect to any other part of the demand, to which the payment of the money does

(1) East Ind. Comp. v. Glover, 1 Str. 612.

(2) De Gaillon v. L'Aigle, 1 Bos. & Pull. 368.

(3) Hannay v. Smith, & another, 3 T. R. 662.

(4) 5 Burr. 2640. 1 T. R. 465. 2 East, 134. By the modern practice, the plaintiff may be nonsuited, although the defendant has paid money into Court. Cotterel v. Apsey, 6 Taunt. 324. The cause goes on substantially, as if the money had not been paid.

(5) Vaughan v. Barnes, 2 Bos. & Pull. 392. Malcolm v. Fullarton, 2 T. R. 645.

not apply, although, if no money had been brought into court, the objection might have been a bar to the whole demand. (1)

Where there is a count on a special contract together with money counts, payment of money generally upon the whole declaration is an admission of the contract on every count, to which the contract is in its nature applicable; and after such an admission the defendant will be precluded from disputing the existence of the contract as stated. (2) Thus in the case of Cox v. Brain (3), where the declaration stated a specific bargain to pay a particular sum of money for certain articles, a general payment of part of the money into Court, by admitting the bargain, admitted also the sum which was originally due; and the only question, that could be raised after that admission, would be, whether the remainder of the money had been previously paid. If the contract had been to pay, not any particular price, but the average price at which such articles were sold, to be ascertained by a certain time, a general payment of money into Court would not have admitted the amount of the breach as stated in the declaration, though it would admit a cause of action on each count, and something due on each of the breaches; the contract is admitted, but not the averment of the average price. (4)

In an action on a bill of exchange, the defendant, by paying money into court generally, dispenses with the regular proof of the party's handwriting (5), and cannot object to the sufficiency of the stamp on which the bill is drawn (6): so, in an action of covenant, he admits the execution of the deed. (7) On the same principle, payment of money into court admits

(1) Cox v. Parry, 1 T. R. 464. Mellish v. Allnutt, 2 Maule & Sel. 106. Blackburn v. Scholes, 2 Campb. 341.

(2) Bennett v. Francis, 2 Bos. & Pull. 550.

(3) 3 Taunt. 95. 2 Barn. Ald. 118.

(4) Stoveld v. Brewin, 2 Barn. Ald. 116.

(5) Gutteridge v. Smith, 2 H. Bl. 374. Middleton v. Brewer, Peake, N. P. C. 15.

(6) Israel v. Benjamin, 3 Campb. 40.

(7) Randal v. Lynch, 2 Campb. 357. Watkins v. Towers, 2 T. R. 275.

the plaintiff's right to sue in that court (1): it admits also the title, on which he sues, as, his being a surgeon (2), or farmer of tithes. (3) So, where the defendant paid money into court generally, upon a declaration containing a count on a policy of insurance together with money counts, he was not afterwards permitted to shew, that the policy was originally different, and had been altered by the broker without his knowledge. (4) And in an action to recover the amount of the sale of goods, which have been sold by sample at a particular price, the defendant will not be allowed to shew, after such general payment into court, that the goods were of a quality inferior to the sample. (5)

But if the plaintiff, previous to the trial, has induced the defendant to believe, that the only point to be tried would be a question of fraud, and has suffered him to prepare his evidence for that purpose, the Court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by the payment of money into court. This was determined by the Court of Common Pleas in the case of Muller v. Hartshorne. (6) Lord Alvanley C. J. on the trial of that case, allowed the defendant to prove fraud on the part of the plaintiff, in order to avoid the instrument. (7) But the Court afterwards declined giving any opinion on that point, because under the circumstances of the case the plaintiff was not at liberty to avail himself of the objection.

Payment of money into court is an admission only of a legal demand. If the contract declared upon be illegal, the defendant cannot give it validity by his admission; no admission of the parties will oblige the court to give effect to an ille-

(1) Miller v. Williams, 5 Esp. N. P. C. 19.
(2) Lipscombe v. Holmes, 2 Campb. 441.
(3) Broadhurst v. Baldwin, 4 Price, 58.
(4) Andrews v. Palsgrave, 9 East, 325.
(5) Leggett v. Cooper, 2 Starkie, 10[illegible].
(6) 3 Bos. & Pull. 556.
(7) Ib. and see 2 Bos. & Pull. 592.

gal transaction. (1) And although paying money into court admits the contract, that is, the entire consideration for the act and the entire act which is to be done for such consideration, yet it will not be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after breach of the contract. In the case of Clarke v. Gray (2), the Court of King's Bench after much consideration determined, that in an action of assumpsit against a carrier for the loss of goods, the plaintiff might maintain his action, although it was proved on the part of the defendants, that he was not to be accountable for more than *5l.* for goods, unless entered as such and paid for accordingly, and the goods in question, though above the value of *5l.*, had not been paid for. The Court was of opinion, that the plaintiff was entitled to retain a verdict, which he had recovered for *5l.*, the limited amount of the damages recoverable under this contract; that this restriction was a part of the contract, collateral to the entire consideration, and to the act to be done for that consideration, and, as it related merely to the liquidation of damages after a breach of the contract, that it might be properly given in evidence to the jury in reduction of damages. It follows from this case, that if the defendant had paid money into court, he would have been allowed to give in evidence the restrictive provision, and that such evidence would not have been inconsistent with the admission of the contract stated in the declaration; though the contrary was decided in the earlier case of Yate v. Willan (3), on the ground, that the notice, containing the restriction, was *a limitation of the contract*, and that if no money had been brought into court, the plaintiff must have been nonsuited. But the Court of King's Bench, adverting to this case in the before-cited case of Clarke v. Gray, said, "It appears to us, that the case of Yate v. Willan cannot be supported to its full extent; for although the payment of money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the

(1) Ribbans v. Cricket, 1 Bos. & Pull. 264. 2 East, 134.

(2) 6 East, 564.

(3) 2 East, 128.

restrictive provision as to the amount of damages to be recovered in case of loss." If indeed the provision is of such a nature as will discharge the defendant from all liability under the contract, unless the plaintiff has complied with the condition, (as was the case in Clay v. Willan (1), where the goods were not to be accounted for to any amount, unless properly entered and paid for,) that will not merely operate in reduction of the damages, but in bar of the action; and therefore in such a case, if the defendant pays money into court on a declaration against a carrier in the common form, he cannot afterwards give in evidence such a provision, which entirely negatives the contract as stated in the declaration.

Proof of payment.

Payment of money into court ought to be proved by the production of the rule of court, or by the office-copy of the rule. It will not be sufficient to call the attorney, who has taken the money out of court. (2)

Bill of particulars.

Thirdly, as to bills of particulars. — It has been before mentioned, that a bill delivered by an attorney to his client for business done during a certain period, or to a tradesman for goods sold, is strong presumptive evidence against any additional item within the same period. The party is not however precluded from shewing, that items, included in a subsequent bill, have been omitted by mistake in the former bill, and that the business, which is the subject of the charge, has been done by him for the defendant. A bill of particulars, delivered under a Judge's order, is more conclusive: its sole object is to inform the opposite party of what he ought to come prepared to try; and it will effectually preclude the party, who delivers it, from giving evidence of any other demand not there stated. Thus, where a declaration contained a count for money had and received for the plaintiff's use, and also a demand for horses sold by the plaintiff to the defendant himself, and the bill of

(1) 1 H. Bl. 298. 6 East, 570.

(2) Israel v. Benjamin, 3 Campb. 40. As to the commencement of the practice of paying money into court, see 2 H. Bl. 376.; 1 Ld. Raym. 254. The production of the rule by the defendant does not entitle the plaintiff to a reply, 2 Taunt. 267.

particulars specified the last demand alone, it was decided that the plaintiff could not give evidence of horses being sold by the defendant as the plaintiff's agent(1): for a contract for the absolute sale of horses to the defendant is essentially different from a contract to repay money received on a sale of horses by commission; and the proceeds of such a sale by the defendant could only be recovered under the count for money had and received, which the plaintiff abandoned by confining his bill of particulars to the demand stated in the other count.

Where the declaration contains a count on a promissory note together with money counts, and the particular of demand includes only the note, the plaintiff will not be allowed to prove the consideration for which the note was given, and if he cannot recover upon the note on account of the want of a proper stamp, he will be nonsuited.(2) And although the plaintiff on perceiving the defect of his first particular of demand, which only mentions the promissory note, delivers a second bill of particulars large enough to comprehend the original debt, yet this will not avail him, unless the second particular has been delivered under a Judge's order.(3) On the other hand, if the plaintiff, either before or after delivering a bill of particulars under a Judge's order, makes a demand of payment only for a part of the articles specified in the bill, such a demand will not have the effect of confining him in his evidence, nor supersede the bill of particulars.(4) If the plaintiff in the former case could have recovered on the promissory note, he might have recovered interest also, as arising out of the principal and incident to it, though interest has not been specifically claimed in the particular of demand, which gives notice of the amount of the note.(5)

In an action of assumpsit, where the defendant pleaded

(1) Holland v. Hopkins, 2 Bos. & Pull. 243.

(2) Wade v. Beasley, 4 Esp. N. P. C. 7.

(3) Brown v. Watts, 1 Taunt. 353.

(4) Short v. Edwards, 1 Esp. N. P. C. 375.

(5) Blake v. Lawrence, 4 Esp. N. P. C. 147.

in abatement, that the promises were made by himself and another person jointly, on which plea issue was joined, and on the trial it appeared from the bill of particulars, that some of the articles had been furnished to the defendant jointly with the person named in the plea, Lord Kenyon C. J. held that the plaintiff was bound by his bill of particulars, which supported the defendant's plea; and therefore he nonsuited the plaintiff.(1) Here the articles, stated to have been furnished on the joint credit of the defendant and another person, were items of the plaintiff's demand; and they were a necessary part of his bill of particulars, if he intended to recover payment upon them against the defendant. And this seems to distinguish the case from that of Miller v. Johnson (2), which was an action for the sale of some lottery tickets, and, as proof of the sale, the particular of the defendant's set-off was produced, which mentioned the fact of the sale of the tickets to himself: but Ch. J. Eyre, who tried the cause, was of opinion that the particular could not properly be used against the defendant for this purpose, and that the fact of sale ought to be proved by other evidence.

Error in particular.

The use of a bill of particulars is to prevent the inconveniences, which might otherwise arise from the general and undefined statements in the plaintiff's declaration, and to apprise the defendant of the particulars of the demand, which the plaintiff has against him. If it gives sufficient information to the opposite party to guard him against surprise, it answers the purpose for which it was intended, and will be sufficient, though it may be in some respects inaccurate. Thus in an action of assumpsit for money paid to the defendant's use, where in the bill of particulars an item for money advanced was by mistake written under the name of A. B. instead of being written under that of C. D. in another part of the particular, and thus appeared to have been advanced to the former, Lord Ellenborough allowed the plaintiff to prove

(1) Colson v. Selby, 1 Esp. N. P. C. 451. A rule to set aside the nonsuit was afterwards refused by the Court.

(2) 2 Esp. N. P. C. 602.

that the item in question was intended, and must have been understood, to refer to the latter name, but by mere clerical error had been misplaced: and that if the defendant could shew by affidavit that he had been misled by the plaintiff's particular, it might furnish a ground for the Court afterwards to set aside that particular sum. (1) So where the work, for which the action was brought, was stated by the particular to have been done in a wrong month, when in fact no work had been done, the plaintiff was allowed to give evidence of his having done work for the defendant in the other month. (2)

Although the general rule is, that the party shall be confined to his bill of particulars, and not admitted to give evidence of any additional demand, yet under certain circumstances, in a case where the proofs produced by the defendant himself established another claim in his favour, the plaintiff has been allowed to have the benefit of such evidence even beyond the contents of the particular. Thus, where an action was brought by one partner against another to recover a balance due on a statement of accounts, the plaintiff by his bill of particulars confined himself to the balance due on separate accounts, in support of which he gave in evidence an account, in which the defendant made himself debtor to a certain amount, and in answer to this evidence the defendant produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due to the defendant on the separate accounts; but on the opposite side of the page, there was a statement also of the partnership accounts, on which the balance was in favour of the plaintiff, and greatly exceeded the balance on the separate account. It was objected that the plaintiff could not recover beyond his particular; the Court however said, that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all that

(1) Day v. Bower, 1 Campb. 69. n. Brown v. Hodgson, 4 Taunt. 198. See also Davies v. Edwards, 3 Maule & Sel. 380; where the locality of the premises, for which the plaintiff sought to recover rent, had been misdescribed in the particular; but the objection was overruled.

(2) Millwood v. Walter, 2 Taunt. 224.

had been proved to be due to him. (1) The parties afterwards came to a compromise, and agreed upon the sum to be recovered. It is to be observed, that there were peculiar circumstances in this case; the written paper, which the defendant gave in evidence as the writing of the plaintiff, could only have been admitted as one entire writing, the whole to be taken together, and was not admissible merely in parts; the defendant could not use in evidence the separate account of the plaintiff without admitting also the partnership account, which was written by him on the same paper, since the one part might have explained or referred to the other: and if the statement of a party is given in evidence against himself, the whole of the statement ought to be received, though all its parts may not deserve the same credit. But it appears to be too much to infer generally from the authority of this case, that, because the evidence adduced by the defendant discloses other items, which might have been included in the bill of particulars, the plaintiff ought therefore to recover on these items, as well as upon those which are specifically mentioned. The case in question must be considered as a particular exception, and not as establishing a rule of so wide and general a nature. The plaintiff, it is presumed, can neither cross-examine the defendant's witnesses to any claim, which he has not comprehended in his particular of demand, nor can he at the trial avail himself of any such claim, though disclosed by the witnesses on the other side in their examination in chief.

Delivery of particular.

An order for particulars of a set-off calls upon the defendant to deliver the particulars within a limited time, and, in default thereof, expressly precludes him from giving evidence in support of his cross-demand. This is the general form of such an order. (2) If it does not specify a certain day, before which the particulars are to be delivered, but only requires them to be delivered forthwith, and they are not delivered till many days after, so as to embarrass the plaintiff for want of time, he has a remedy by applying to the court, and he ought

(1) Hurst v. Watkis, 1 Campb. 68.

(2) See form, in Tidd, App. ch. 22. s. 10.

not to wait till the time of trial before he objects to the lateness of the delivery; by accepting the particulars, and not making an application to the court, he waves the objection. (1)

The particulars of demand are proved by the production of the judge's order, and by proof of the delivery of the particulars; and this delivery will be sufficiently proved by proving the signature of the party's attorney, or of his agent, on the particulars. Proof of particular.

SECT. IV.

The Affirmative of the Issue is to be proved.

THERE are several general rules, of great use in ascertaining, whether the plaintiff or defendant will have to prove the issue on the record. One of the most useful of these is the rule, which has been taken as the subject of the present section, namely, that the point in issue is to be proved by the party who asserts the affirmative; according to the maxim of the civil law, "Ei incumbit probatio, qui dicit, non qui negat." One or two instances will be sufficient to illustrate this rule.

In an action for a loss, occasioned by barratry in the master of a ship, where it was objected by the defendant, that the plaintiff ought to prove that the master was not also the owner or freighter, and that he did not act under the direction of the person who was, (in which case barratry could not be committed,) the court held, that, if the master was owner or freighter, or acted under the direction of the owner, the burthen of proving that fact lay on the defendant. (2) "It was not incumbent on the plaintiff," said Mr. Justice Buller, "to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were

(1) Lovelock v. Chiveley, 1 Holt, N. P. C. 552.

(2) Ross v. Hunter, 4 T. R. 33. 38.

not the owner, it is immaterial who was; proof of that fact, which operates in discharge of the other party, lies upon him."

In an action on the game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified; yet it is not necessary to disprove his qualifications · but it will be for the defendant, if he can, to prove himself qualified. (1) And it has lately been determined by the Court of King's Bench, that the same rule of evidence applies as well to proceedings on informations before magistrates, as to actions for penalties; and that a conviction, which specifically negatives the several qualifications mentioned in the statute, is sufficient, without stating evidence to negative those qualifications. (2) If such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict, in consequence of the great number of distinct heads of qualification, which are enumerated in the statute. On the other hand, all the qualifications specified are peculiarly within the knowledge of the qualified person. If he is entitled to any such estate as the statute requires, he may prove it by his title-deeds, or by the receipt of the rents and profits; or if he is the son and heir apparent, or servant to any lord or lady of a manor, and appointed to kill game, that will be a good defence. All these qualifications are peculiarly within the knowledge of the party himself; but the prosecutor has probably no means of proving a disqualification.

(1) By Lord Mansfield, in Spieres v. Parker, 1 T. R 141. Buller J in 1 T. R. 649. Heath J. in Jelfs v. Ballard, 1 Bos & Pull 468. Chambre J. in Frontine v. Frost, 2 Bos. & Pull. 307. adm. per Cur. in R. v. Stone, 1 East, 650.

(2) R. v. Turner, Trin. Term 1816. Maule & Selw. MS. Lawrence J. and Le Blanc J. were of this opinion in the case of R. v. Stone, 1 East, 65[illegible] — A distinction was at one time made between these cases; and several of the Judges were of opinion, that some evidence of the want of qualification ought to be produced before the magistrate. See R. v. Jarvis, 1 Burr. 148. 153 [illegible] East, 643. (c) S. C. By Lord Kenyon and Grose, J in R v. Stone, 1 East, 649.; and Chambre J. in 3 Bos. & Pul. 307. And see R. v. Marriott, 1 Str. 66. Bluet q. t. v. Needs, Com. Rep. 522. 525.

Where one party charges another with a culpable omission or breach of duty, the general rule above laid down does not apply. In such a case, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved. Thus, in a suit for tithes in the Spiritual Court, where the defendant pleaded, that the plaintiff had not read the thirty-nine articles, the court called on the defendant to prove the fact, though a negative: upon which, he moved the Court of King's Bench for a prohibition; but it was refused, for the reason already stated. (1) So, in an action by the owner of a ship against the defendants, for putting on board a quantity of combustible and dangerous articles "without giving due notice thereof," the court held, that it lay upon the plaintiff to prove this negative averment. (2) And in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises well repaired at the end of the term, the proof of the breach lies upon the plaintiff; this breach, though in terms it involves a negative, admits of as easy proof, as if it had been expressed in the affirmative.

Party, charging a breach of duty, must prove it.

On the trial of an indictment on the statute 42 G. 3. c. 107. s. 1., which makes it felony to course deer on an inclosed ground "without the consent of the owner of the deer," it ought to appear from the evidence produced on the part of the prosecution, that the owner had not given his consent. According to the report of a late case (3), it seems to have been thought necessary to call the owner of the deer, for the purpose of disproving his consent; and the owner not being called, the jury were directed to find a verdict of acquittal. The particular circumstances of that case are not stated in the report; and it is not easy to discover upon what principle such evi-

(1) Monke v. Butler, 1 Roll. Rep. 83. cited by Lord Ellenborough, 3 East, 199. Powell v. Milbank, 2 Black. Rep. 851. S. P. See also Lord Halifax's case, Bull. N. P. (298), R. v. Combs, Comb. 57. Gilb. Ev. 132.

(2) Williams v. East Ind. Comp. 3 East, 193. 199. R. v. Hawkins, 10 East, 211.

(3) R. v. Rogers, 2 Campb. 654. by Mr. Justice Lawrence. See R. v. Mallinson, 2 Burr. 679. R. v. Cordon. 4 Burr. 2279.

dence was held to be indispensable. If the circumstances were of such a nature as to raise a reasonable presumption, that what had been done had not been done illegally, (which, however, it is difficult to conceive,) then, doubtless, the direct evidence of the owner would be necessary to repel that presumption, and to establish the charge against the prisoner. But, as a general proposition, it may be safely laid down, that the non-consent of the owner may be properly inferred from the conduct of the prisoner, and the circumstances under which the act was done, such as the secresy of the proceedings, the attempt to conceal, the disguise of the prisoner, or his resistance, or any other circumstance of guilt; and that the evidence of the owner, to negative the supposition of his consent, is not more strictly necessary on this prosecution, than on a charge of larceny, in which it is an essential ingredient, that the goods should have been taken against the owner's consent, and yet the owner is never questioned as to that point, though he is often called to prove the property.

If the plaintiff bring an action against the defendant for some act done by him, and the defendant plead the general issue, and in bar of the action plead further an illegal act done by the plaintiff, which would justify him in doing the act which is the subject of the suit, here the plaintiff will have to prove the whole of his case in the first instance: he ought not only to prove his right of action, but also negative the act imputed to him by the defendant's plea. Thus, in the case of Rees v. Smith (1), which was an action of trespass for breaking into the plaintiff's house, and seizing his goods, and the defendant pleaded, besides the general issue, a fraudulent removal of the goods to avoid a distress for rent, the plaintiff at first only proved the trespass, the defendant then gave evidence in support of his plea, after which the plaintiff's counsel offered general evidence, to negative the supposition of a fraudulent removal, but Lord Ellenborough rejected the evidence. The general rule, he said, is, that when the defence is known, by pleading, or by means of notice, the counsel for the plaintiff, is

(1) 2 Starkie, N. P. C. 30

bound to open the whole case in chief, and cannot proceed in parts. If, added Lord Ellenborough, any one fact be adduced by the defendant, to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact: he cannot go into general evidence in reply to the defendant's case. There is no instance, in which the plaintiff is entitled to go into half his case, and reserve the remainder."

Where the presumption of law is in favour of the defendant's plea, there it will be incumbent on the plaintiff to disprove the plea, though in so doing he may have to prove a negative. As, in an action on a bond, if the defendant plead payment, and the bond appears to have been outstanding for twenty years, the law presumes that the principal debt has been discharged; this legal presumption of itself affords a defence, in support of the plea; and, to repel the presumption, it will be necessary for the plaintiff to produce evidence, from which the contrary presumption of non-payment may be inferred; such as, evidence of payment of interest, or of an admission of the debt.

It is a general rule of evidence, that the burthen of proof lies on the person who has to support his case, by proof of a fact of which he is supposed to be cognizant. Thus, in an action by the assignees of a bankrupt, where the defendant, under a notice of set-off, gave in evidence promissory notes dated before the bankruptcy, the Court held that he ought also to shew, that the notes came to his hands before that time. (1) So, where the question is on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party, who asserts the illegitimacy, ought to prove it (2): but if there has been a divorce *a mensâ et thoro*, the presumption is, that a child born afterwards, (that is, beyond the time of gestation,) is illegitimate (3); it will be suf-

(1) Dickson v. Evans, 6 T. R. 57. See other examples, in criminal cases, 2 East, P. C. 782.

(2) See ante, p. 154.

(3) Parishes of St. George and St. Margaret, 1 Salk. 123. See ante, p. 155.

ficient, therefore, in such a case, to prove the divorce; and this will call upon the opposite party to establish the legitimacy by proof of access.

Issue on person's death.

Where the issue is upon the life or death of a person, the proof of the fact lies upon the party who asserts the death, for the presumption is, that the party continues alive, until the contrary be proved. (1) But where no account can be given of the person, this presumption of the duration of life ceases at the expiration of seven years from the time when he was last known to be living (2); a period, which has been fixed, from analogy to the statute of bigamy (3), and the statute concerning leases determinable on lives. (4)* Thus, in the before-cited case of Doe v. Jesson, where it was proved, that a person went to sea at a particular time, which was the last account given of him, his death was presumed at the end of seven years from that time. And therefore, where the defendant pleaded coverture in bar of an action of assumpsit, and proved her marriage, and that her husband went abroad twelve years before the commencement of the action, this was held not to be sufficient, and the defendant was required to prove that her husband was alive within seven years (5): without

(1) Wilson v. Hodges. 2 East, 312.

(2) Doe. dem. George v. Jesson, 6 East, 80. 85. Roe v. Hasland, 1 Black. 404

(3) St. 1 J. 1. c. 11. s. 2.

(4) St. 19 C. 2. c. 6.

(5) Hopewell v. De Pinna, 2 Campb. 113. Doe. dem. Banning v. Griffin, 15 East, 293., stated infra.

* The statute of bigamy contains a proviso, that "it shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself, the one from the other, by the space of seven years together within the king's dominions, the one of them not knowing the other to be living within that time." It has been held, that the last clause, (namely, "the one of them not knowing," &c.) relates only to the 2d clause, and not to the first respecting common ~~~y beyond the seas: and consequently, that the second marriage is not felonious, where either of the parties is beyond the seas for seven years, though the party in this country had notice that the other was living. 3 Inst. 88. 1 Hal. P. C. 692. 4 Bl. Com. 134.

such additional proof, the jury might have presumed the death of the husband at the time of the promise, which would have been against the defendant's plea.

There are cases, in which a person has been presumed to be still living, though not heard of for some time. But this presumption would not be made, in contravention of another presumption or principle of law, by which every person is supposed not to have acted illegally, till the contrary is proved. Thus, in the late case of the King v. the Inhabitants of Twyning (3), where the question was, whether the children of a second marriage were settled in the appellant parish, the place of the mother's settlement, or whether they were settled as illegitimate children in a third parish where they were born; the question, therefore, depended upon the validity of the second marriage, which took place in about twelve months after the first husband had gone abroad as a soldier on foreign service, and from that time he had not been heard of: it was contended on the part of the appellant parish, that the first husband must be presumed, in the absence of all proof to the contrary, to be living at the time of the second marriage, and that the children of the second marriage were consequently illegitimate; on the other side, it was answered, that, if the husband was alive at the time of the second marriage, the wife was guilty of bigamy, and that the presumption of his being alive ought not to be favoured, where the inevitable inference must be, that another person had committed a criminal act; and the Court of King's Bench were of this opinion. The Court determined, that the sessions had decided right in holding the second marriage to have been valid, no proof having been given that, at the time of that marriage, the first husband was alive: Mr. Justice Bayley said, the case was one of conflicting presumptions, and the question was, which presumption ought to prevail: the law presumes the continuance of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary be proved.

(1) 2 Barn. Ald. 386.

Although, in general, it is necessary for a party, who brings an action, to prove all the material facts which he alleges in support of his claim, yet where the defendant pleads a fact within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burthen of the proof lies on the defendant, not upon the plaintiff. Thus in action of assumpsit, where the defendant pleaded infancy, and the plaintiff replied, that "the defendant, after he had attained his full age, ratified and confirmed the promise and undertaking," the Court held, that the mere proof of a promise to pay was sufficient on the part of the plaintiff; and that it was for the defendant to prove the personal incapacity to contract, on which he grounded his defence, and which lay so peculiarly within his own knowledge. (1)

Sect. V.

The Substance only of the Issue need be proved.

The next general rule to be considered is, that on any issue it will be sufficient to prove the substance of the issue.

It is a general principle of evidence, that all the material facts in the declaration, which are put in issue, must be established by legal proof. Another principle is, that the nature and extent of the proof will depend upon the manner, in which the alleged facts are introduced; allegations, which are merely matters of inducement, do not require such strict proof as those, which are precisely put in issue between the parties. (2) Evidence, as Lord Mansfield used frequently to observe, is always to be taken with reference to the subject-matter, to which it is applied, and to the person against whom it is used.

There are a great variety of examples, both in civil and criminal cases, which might be cited in illustration of the rule now

(1) Borthwick v. Carruthers, 1 T. R. 648.

(2) By Chambre J. 1 New Rep. 210.

under discussion. The object of the present section will be to make a selection of such examples, as appear most generally useful. And it will not be foreign to the subject, afterwards to consider the nature of material and immaterial averments, and the doctrine of variances.

Examples in civil cases.

In an action on a bond, if the defendant plead *solvit ad diem*, the issue will be maintained by proof of payment *before* the appointed day. And payment to a third person by the appointment of the plaintiff will be substantially payment to the plaintiff himself. In a case, where the defendant pleaded payment of the principal sum and of all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the Lord Ch. Justice Raymond held the proof to be sufficient. (1) So, in an action upon a special promise to deliver up the bond on the payment of a sum of money, which had been borrowed of the defendant; the evidence for the plaintiff was, that the money had been tendered to the defendant, and the bond had been demanded, but refused; and, an objection being made on the part of the defendant, that the plaintiff's case had not been proved as laid, Lee Ch. J. over-ruled it; and the Court of Common Pleas, after taking time to consider, were unanimously of opinion, that the evidence was sufficient to support the declaration; as the tender on the one side, and the refusal to accept on the other, were in point of law equivalent to payment. (2)

In an action of waste, for cutting down a certain number of trees, proof that the defendant cut a smaller number is sufficient; for, in effect the issue is waste or no waste. (3) And in an action of covenant, when the breach assigned is, "that the defendant has not used a farm in a husbandlike manner, but on the contrary has committed waste, &c." to which the defendant pleads, "that he has not committed

(1) Price v. Brown, 2 Str. 690.
(2) Alcorn v. Westbrook, 1 Wils. 115. Wright J., at first, contrà.
(3) Co. Lit. 282. *a.* 2 Roll. Ab. 706. tit. Verdict, C. 40.

waste, &c., but used the farm in a good and husbandlike manner, and issue is taken upon this, the plaintiff cannot give evidence of any unhusbandlike treatment of the farm, not amounting to waste; for the issue is narrowed to this point. (1)

In an action against a sheriff, where the plaintiff declared, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and a special verdict was found, that the husband alone was taken in execution, (the execution being for a debt due from the wife before coverture,) and that he escaped, the Court held that the substance of the issue was found, and gave judgment for the plaintiff. (2)

In an action on a simple contract, whether assumpsit or debt, the plaintiff may prove and recover a less sum than he has demanded in the writ; and for this reason, it has been held, that a declaration in such action is not bad for specifying a less sum, though the breach assigned is the nonpayment of the whole sum demanded. (3)

In actions for slander, the courts used at one time to hold, that the plaintiff was bound to prove the words precisely as laid; but it is now settled that it will be sufficient, if the plaintiff prove some material part of the words alleged on the record. If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them. (4) In the late case of Hall v. Smith (5), where the declaration stated, that the plaintiff was a trader at C. and also a trader at O., and that the defendant spoke concerning the plaintiff as such trader, that he was a bankrupt at C., &c., it was proved at the trial, that the plaintiff carried on a trade at O., but not that he carried on the other trade at C. as stated, and the words spoken of him were, that he was a bankrupt at

(1) Harris v. Mantle, 3 T. R. 307.

(2) Roberts and Wife v. Herbert, 1 Sid. 5. S. C. cited Bull. N. P. 299.

(3) M'Quillin v. Cox. 1 H. Bl. 249.

(4) Compagnon v. Martin, 2 Bl. Rep. 790.

(5) 1 Maule & Sel. 287. Figgins v. Cogswell, 3 Maule & Sel. 369. Solomons v. Medex, 1 Starkie, 191. Hancock v. Winter, 7 Taunt. 205.

with the liquor trade, (which was the trade carried on at Q.) the Court held that the substance of the charge had been proved, and that the place, where the plaintiff was stated to have become a bankrupt, was immaterial.

In an action of replevin, where the defendant avowed taking the cattle as damage-feasant, the plaintiff pleaded in bar, that one W. was seized of a house and land, &c., whereto he had common, &c., and demised the same to him to hold from a certain day next before for a year; the avowant traversed the lease *modo et formâ*, upon which issue was taken; the jury found a special verdict, that W. made a lease to the plaintiff on the day stated for a year; and the plaintiff had judgment, for although this is not the same lease as pleaded, (since this begins on the day, and the other not so soon,) yet, the Court said, the substance of the issue is, whether or not the plaintiff had such a lease, as by force thereof he might have common at the time, and this appeared to be the case here. (1) But, the Court added, it (the verdict) must not depart altogether from the form of the issue; for if it had been found, that he had right of common by a lease from another, or as an owner, that had been clearly out of the issue both in matter and form. And they admitted, that if the plaintiff had declared thus *in ejectione firmæ*, it would have been clearly against him; for there he demands and recovers the term, and therefore must make his title truly. In the principal case, as the reporter observes, the jury might have found directly against the plaintiff *non dimisit modo et formâ*, and could not safely have found a general verdict for him; but the jury having found specially, the Court gave judgment for the plaintiff. (2)

If the issue joined between the parties is, whether A. and B. were churchwardens, proof that one was, and not the other, would not be sufficient. (3) So, where the declaration averred,

(1) Pope v. Skinner, Hob. 72. S. C. cited Bull. N. P. 300. Forty v. Imber, 6 East, 434.

(2) S. C. cited as to this point, Com. Dig. tit. Pleader, S. 7.

(3) Bull. N. P. 299.

that the plaintiff was constable of a particular parish, and that he was assaulted in the execution of his office as constable, and it appeared on the evidence, that he had been sworn in to serve for a whole liberty of which the parish formed a part, this was held to be a material variance. (1)

Examples in criminal cases.

The same general rule of evidence applies, if possible, still more strongly to the case of criminal prosecutions than to civil suits. On a charge of petit treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder. (2) On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night—or on a charge of robbery, where the property was not taken from the person by violence, or by putting him in fear—the prisoner may be found guilty only of the simple larceny. (3) On the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal matter is the killing, and the malice is only a circumstance in aggravation. (4) And if the manner or means of the death proved agree in substance with the means charged in the indictment, it will be sufficient; as, where the indictment is for killing with a dagger, and the evidence prove a killing with a staff (5); or if the indictment be for killing with one sort of poison, and the evidence proves the killing with another, such evidence maintains the indictment, because the proof of the instrument is not absolutely necessary to the proof of the fact itself (5); but if the charge is for poisoning, and the death is proved to have been caused by striking or starving, &c., this evidence would not support the indictment, as the species of death in the one case is totally different from that in the other. (6)

(1) Goodes v. Wheatly, 1 Campb. 231.

(2) Case of Swan and Jefferys, Fost. Disc. 104.

(3) 2 East, P.C. 513. 515. 516.

(4) Mackalley's case, 9 Rep. 67. *b.* Co. Lit. 282. *a.* Gilb. Ev. 233.

(5) 9 Rep. 67. *a.* Gilb. Ev. 231. 1 East, P.C. 341.

(6) 9 Rep. 67. *a.* Gilb. Ev. 231. 1 East, P. C. 341. 2 Inst. 319.

If the indictment charges that A. gave the mortal blow, and that B. and C. were present aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present aiding, &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. (1) The identity of the person, supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law, and in sound reason too, the stroke of all. They are all principals in law, and principals in deed. If two persons are indicted as principals, and one is proved to be only accessary, he must be discharged on this indictment (2), for in consideration of law their offences are quite different. And one indicted as accessary before the fact cannot be convicted upon evidence proving him to have been (principal in the second degree) present aiding and abetting at the fact. (3) In Mackalley's case (4), where the prisoner was tried for the murder of a serjeant at mace in London, the indictment charged, that the sheriff made a precept to the serjeant for the arrest, and it appeared upon the evidence, that there was no such precept, but that the serjeant made the arrest ex officio at the plaintiff's request on the entry of the plaint, according to the custom of the city; and all the Judges held, that the variance between the indictment and the evidence was not material, because the warrant to arrest was only a circumstance, and the substance of the matter had been found, which was, that the prisoner killed an officer in the lawful execution of legal process. The Judges were also of opinion, that the indictment might have been general, (that the prisoner feloniously and of his malice prepense killed, &c.) and that the special matter might have been given in evidence; and since the indictment in the principal case contained such an averment, they held that the charge of murder had been

(1) Mackalley's case, 9 Rep. 67. *b.* 1 Plowd. 98. Wallis's case, 1 Salk. 334. Fost. Disc. 351.

(2) Gilb. Ev. 232. See Fost. 361.

(3) Gordon's case, 1 East, P. C. 352.

(4) 9 Rep. 61. *b.* 67. *a.* 68. *a.*

proved, notwithstanding that the special matter given in evidence, might vary in substance from the special matter contained in the indictment.

Averments when immaterial.

A great variety of cases occur in the books with respect to the necessity of proving averments in pleadings. Immaterial averments need not be proved: but because an averment might have been unnecessary, it will not therefore follow that it is immaterial. (1) In an action on a promissory note against the maker, an averment of indorsement by the payee to the plaintiff is unnecessary, when the note is made payable to bearer; yet, if the averment is made, it is not immaterial, and Lord Ellenborough held that it ought to be proved. (2) And if a defendant aver, in his plea of abatement, that he was baptized by another name, he is bound to prove strictly this allegation, though the averment of the name of *baptism* was unnecessary. (3)

An averment, which is merely matter of inducement to the action, need not be proved with the utmost strictness and precision. Thus where an action was brought to recover double the value of goods, which had been removed for the purpose of preventing a distress, and the declaration stated a certain sum to be in arrear for rent, it was decided that the plaintiff was entitled to recover, although the notice of distress was for a less sum. (4) Whether the particular sum stated in the declaration was in arrear, must be perfectly immaterial; the damages were not to be measured by the quantity of rent, but by the value of the goods, which had been removed.

The general rule concerning the materiality of averments is, that if the whole of an averment may be struck out without

(1) 1 Maule & Sel. 204. Crawley v. Blewett, 12 Mod. 127. Savage q. t. v. Smith, 2 Blac. Rep. 1191. Turner v. Eyles, 3 Bos. & Pull. 456.

(2) Waynham v. Bend, 1 Camph. 175.

(3) Weleker v. Le Pelletier, 1 Campb. 479.

(4) Gwinnet v. Philips, 3 T. R. 643.

destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover. (1) Thus, in the case of Bristow v. Wright (2), which was an action against the sheriff for taking the goods of a lodger without leaving a year's rent, the declaration stated some particulars of the demise relative to the time of payment of rent, which were negatived by the evidence, and the Court held that the variance was fatal. There, it was necessary for the plaintiff, in order to shew that he was landlord, to set forth a contract between himself and the tenant, and no part of the contract alleged could be struck out, because it was in its nature entire, though it was admitted that the part of the contract relating to the time of payment need not have been averred. And the case of Williamson v. Allison (3) illustrates the other part of the rule, namely, that where an averment may be struck out, it need not be proved. That was an action on the case in tort, for the breach of a warranty in selling goods unfit for sale, and the declaration averred, that the defendant knew the goods to be in an unfit state, of which fact there was no evidence at the trial, but the Court held that such proof was unnecessary, for if the whole averment respecting the defendant's knowledge of the unfitness for sale were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved.

The same rule is applicable to averments in an indictment. If an averment may be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as a surplusage, and may be disregarded in evidence. Thus, where the prisoner was charged with a robbery near the highway, and the robbery was proved, but not near the highway (4)—where the rob-

(1) By Lawrence J. in Williamson v. Allison, 11 East, 452.

(2) 2 Doug. 664. See 5 T. R. 496. 2 East, 453. 452. 8 East, 9.

(3) 2 East, 446. See also Peppin v. Solomon, 5 T. R. 496.

(4) Wardle's case, 2 East, P. C. 785.

bery was averred to have been committed in the house of a certain person named, and the name of the owner was not proved(1) — and where the offence of arson was stated in the indictment to have been committed in the night-time, and was proved not to have been in the night-time (2), — in these cases, all the Judges were of opinion, that the convictions were proper, and the prisoners were ousted of the benefit of clergy. But where the averment in the indictment is sensible and material, it ought to be regularly proved; as, where the prisoner was indicted for a burglary in the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no such person had any goods in the house, but that the name of J. W. was put by mistake for J. D.(3), the Judges held, that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted.

Another rule, which runs through the whole of the criminal law, is, that it will be sufficient to prove so much of the indictment as charges the defendant with a substantive crime. If the indictment charges, that the defendant did and caused to be done a particular act, it is enough to prove either the one or the other. If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (4)

Variance in proof of contract.

Where the action is brought upon a contract, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved vary materially from that stated in the pleadings, the whole foundation of the action fails, since the contract is entire and indivisible. (5) If the

(1) Pye's case, Johnstone's case, 2 East, P. C. 785.

(2) Minton's case, 2 East, P. C. 1021.

(3) Jenks's case, 2 East, P. C. 514.

(4) R. v. Hunt, 2 Campb. 583. R. v. Williams, ib. 646. See also cases in 2 East, P. C. 515. 516. and supra, p. 218.

(5) 1 T. R. 240.; 3 T. R. 645. The following are the principal modern cases on this subject; Bristow v. Wright, 2 Doug. 664. (supra, p. 221. S. C.) Carlisle v. Trears, Cowp. 671. Churchill v. Wilkins, 1 T. R. 447. Durston v. Tuthan, cited 3 T. R. 67. Littler v. Holland, 3 T. R. 590. Hockin v. Cooke, 4 T. R. 314. Leery v. Goodson, 4 T. R. 687.

contract, therefore, for the breach of which the action is brought, was in the alternative at the option of the defendant, (as to deliver *this* or *that* quantity of goods at one time, and the remainder at another,) it ought to be so stated, for if the declaration states an absolute contract, and the proof is of a contract in the alternative, the plaintiff cannot recover, although the defendant may have determined his option. (1)

This rule is not confined to actions of assumpsit. In an action of tort also, where the contract is necessary to be stated in order to maintain the ground of action as laid in the record, the contract ought to be proved as stated. Thus, in an action against two defendants for deceit, charged in the declaration to have been committed by them in a joint sale of their joint property, the Court of King's Bench held, as there was no evidence against one of the defendants, that the action could not be maintained against the other. (2) The joint contract here described, said Lord Ellenborough, in delivering the judgment of the Court, is the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity; and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects.

It will not be necessary for the plaintiff to state all the several parts of a contract, which consists of distinct and collateral provisions: but it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consider-

White v. Wilson, 2 Bos. & Pull. 116. Penny v. Porter, 2 East, 2. Brown v. Sayce, 4 Taunt. 320. Pool v. Court, 4 Taunt. 700. Cohen v. Hannam, 5 Taunt. 101. Arnfield v. Bate, 3 Maule & Sel. 173. Squire v. Hunt, 3 Price, 68. Wildman v. Glossop, 1 Barn. Ald. 9. Tucker v. Cracklin, 2 Starkie, 385.—The following are cases on promissory notes and bills of exchange. Whitwell v. Bennet, 3 Bos. & Pul. 559. Gordon v. Austin, 4 T. R. 611. Johnson v. Mars, 2 Campb. 305. Roche v. Campbell, 3 Campb. 247. Hodge v. Fillis, 3 Campb. 463. Hutchinson v. Piper, 4 Taunt. 810. Exon v. Russell, 4 Maule & Selw. 505. Mountstephen v. Brooke, 1 Barn. Ald. 224.

(1) Penny v. Porter, 2 East, 2.; and see 2 East, 134.; Cooke v. Munstone, 1 Bos. & Pul. N. R. 351.

(2) Weall v. King, 12 East, 452.

ation, including the time, manner, and other circumstances of its performance. (1) Thus, if there is a provision in the contract to discharge the party from all liability, in case a particular condition is not complied with, it ought to be set out and strictly proved: but it is otherwise, where the provision respects only the liquidation of damages on a breach of the contract; such a provision need not be stated in the pleadings. (1) So, in an action on the case upon the warranty of a horse, if the plaintiff states truly the whole of the consideration for the promise of the defendant, (which, in the case referred to, was the re-delivery of the horse to the defendant,) and then states truly the substantive parts of the warranty, of the breach of which he complains, this will be sufficient, without averring other parts of the warranty entirely collateral and irrelevant to those stated. (2) In the case of Gladstone v. Neale(3), the contract stated was for the purchase of a certain quantity of goods, (" to wit, eight tons,") and the contract proved was for the purchase of " *about* 8 tons," the exact amount not being known at the time of making the contract, but being ascertained before the action was brought; and it was determined at the trial, and afterwards by the Court of King's Bench, that the variance was not material.

In all cases of joint contracts, in writing or by parol, or *ex quasi contractu*, and in all cases of joint obligations, it seems now to be settled, that if one only be sued, he may plead the matter in abatement, but cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence. Thus in an action against the defendant as drawer of a bill of exchange, who pleaded non assumpsit, and it appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly; on a motion to set aside the verdict, (which had been found for the plaintiff,) upon the ground of this supposed variance, the

(1) Clarke v. Gray, 6 East, 564. 569. Supra, p. 201. S. C. Thornton v Jones, 2 Marshall, Rep. 287.

(2) Miles v. Sheward, 8 East, 7 Cotterill v. Cuff, 4 Taunt. 285. Squier v. Hunt, 3 Price, 68.

(3) 13 East, 410.

Court of Exchequer was clearly of opinion, that there was no variance between the bill of exchange proved, and that which was declared upon. (1) The same rule holds, when the action is brought against one of several partners; the defendant must plead in abatement, and cannot give the partnership in evidence under the general issue. (2) Formerly, a different rule was adopted, on the ground of a supposed variance. (3) But with respect to the party suing, the rule is still the same; namely, that if an action of assumpsit is brought by one only of several parties to a contract, who ought to join, the defendant may take advantage of it upon the general issue of non assumpsit. (4)

A distinction, however, has been made, in this respect, between actions of assumpsit and actions of tort; and, in the latter case, if one only of several persons, who ought to join, bring the action, the defendant cannot avail himself of the variance under the general issue, but must plead it in abatement. (5) There is a distinction also between these forms of action, with respect to the party sued. For if several persons jointly commit a tort, the plaintiff has his election to sue all or any number of the parties, a tort being in its nature the separate act of each individual; and therefore in actions *ex delicto* against one only, (such as trover, trespass, case for malfeasance, and the like,) for a tort committed by several, the defendant cannot plead such matter in abatement or in bar, nor give it in evidence on the general issue. (6)

The rule, above laid down with respect to contracts,

Variance in proof of prescription.

(1) Evans v. Lewis, 1794, MS. case, reported in Mr. Serjt. Williams's edit. of Saund. 1 V. 291. d. Germain v. Frederick, MS. case, id. Rees v. Abbott, Cowp. 832. Powell v. Layton, 2 New Rep. 365. See ante, p. 176.

(2) Rice v. Shute, 5 Burr. 2611. Abbott v. Smith, 2 Black. 947. 1 Bos. & Pul. 73. See ante, p. 176.

(3) Boson v. Sandford, 2 Salk. 440. [illegible]

(4) Leglise v. Champante, 2 Str. 820. Graham v. Robertson, 2 T. R. 282. 1 Saund. 291. *f.* in note. Teed v. Elworthy, 14 East, 210.

(5) Dockwray v. Dickenson, Skin. 640. Leglise v. Champante, 2 Str. 820. Addison v. Overend, 6 T. R. 766. Sidgworth v. Overend, 7 T. R. 279. Bloxham v. Hubbard, 5 East, 420.

(6) Boson v. Sandford, 1 Show. 29. Mitchell v. Tarbutt, 5 T. R. 651.

applies equally to the case of a prescription: a prescriptive right is one entire thing, and, when put in issue, must be proved as stated. It ought to be proved, therefore, to the full extent to which it is claimed. Thus, in replevin, if the defendant avow taking the cattle as damage feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not be sufficient, for the issue is upon the whole. (1) But though the party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (2)

A distinction is to be made between the case of a prescriptive right of common alleged in bar, on which issue is taken, and a possessory right of common claimed in an action of tort for disturbance of the right. In the latter case, it is sufficient to prove the same ground of action as is laid in the declaration, although not to the extent there stated. If the allegation is, that the plaintiff was entitled to the right of common in respect of a certain quantity of land, and the proof is in respect of a part only of that land, it will be sufficient (3); so, if it is claimed in respect of a messuage and a certain number of acres of land, and proved to be in respect only of land. (4) The proof, in these cases, is not of a different allegation, but of the same allegation in part; and that is sufficient. (5)

Variance in proof of deed.

Where a deed is declared upon, and it appears, on comparing and reading the record with the instrument produced,

(1) Sloper v. Allen, 2 Roll. Ab. 706. tit. Trial. c. 41. S. C. cited Bull. N. P. C. 299. Gray's case, 5 Rep. 79. Down's case, 4 Rep. 29. b. Rogers v. Allen, 1 Campb. 313. See Brook v. Willett, 2 H. Black. 224.

(2) Bushwood v. Bond, Cro. El. 722 Bailiff, &c. of Tewksbury v. Bricknell, 1 Taunt. 142.

(3) Yarly v. Turnock, Cro. Jac. 629. Palmer, 269. S. C. 2 Barn. Ald. 366.

(4) Ricketts v. Salwey, 2 Barn. Ald. 360.

(5) 2 Barn. Ald. 366.

that some of the words, stated in the pleadings as descriptive of the deed, (and which cannot be rejected as surplusage,) vary from the deed, the variance will be fatal (1); and though some parts of the deed, which the declaration purports to set out at length, need not have been stated at all, or might have been stated shortly according to their legal effect and operation (2), yet if they are set out at length, they ought to be proved as laid, and in case of a variance the plaintiff must fail. A qualified covenant ought to be stated with all its qualifications; if it is set out in the declaration as a general covenant, and on reading the deed in evidence it appears to be subject to an exception or limitation, the variance will be fatal. (3)

A similar rule has been laid down, where a record is referred to in the pleadings. If the allegation is descriptive of the record, it ought to be strictly and literally proved as laid. Thus, in the case of Green v. Rennett (4), where a writ was described in terms, when sued out and when returnable, and on the production of the writ itself it appeared to be returnable on a different day from that stated in the declaration, the Court held that the variance was fatal, though the day of the return was laid under a videlicet.* Variance in proof of record.

(1) The following are the principal modern cases on this subject:— Sands v. Ledger, 2 Ld. Raym. 792. Pitt v. Green, 9 East, 188. Bowditch v. Mawley, 1 Campb. 195. Howell v. Richards, 11 East. 633. Waugh v. Russell, 5 Taunt. 707. Tempany v. Bernard, 4 Campb. 20. Morgan v. Edwards, 2 Marshall, 96. Hoar v. Mill, 4 Maule & Selw. 470. Weeks v. Maillardet, 14 East, 568. Gordon v. Gordon, 1 Starkie, 294. Horsefall v. Testar, 7 Taunt. 385. Cartridge v. Griffiths, 1 Barn. Ald. 57.

(2) Dundas v. Lord Weymouth, Cowp. 665. Price v. Fletcher, Cowp. 727. Roulston v. Clarke, 2 H. Bl. 563.

(3) Howell v. Richards, 11 East, 633. Tempany v. Bernard, 4 Campb. 20.

(4) 1 T. R. 656. 9 East, 161. 163. Brown v. Jacobs, 2 Esp. N. P. C. 726. R. v. Taylor, 1 Campb 404. See also Com. Dig. tit. Record (C), (D). R. v. Leefe, 2 Campb. 141. Woodford v. Ashley, 2 Campb. 193.

* Where the circumstance averred in the pleadings, (as, of a particular sum or day,) is material, the addition of a *videlicet* will not render the averment immaterial, (Grimwood v. Barrit, 6 T. R. 460. 463.;) though the omission of a videlicet may in some cases make an averment material, which would not otherwise be so. (Symmons v. Knox, 3 T. R. 65. 68.)

The return-day, in the last case, was material, because it was part of the description of the writ stated, which could only be proved by a writ returnable on the same day. But where the pleadings do not undertake to set out the tenor of the record, and the substance only of the record is stated, there a variance between the allegation and the record will not be fatal, provided the allegation is substantially proved. Thus in the case of the King v. Lookup, on a prosecution for perjury, where the objection was, that the indictment stated a bill in Chancery to be directed to Robert Lord Henley, &c., and it appeared in evidence to have been directed to Sir Robert Henley, Knight, &c. the Court over-ruled the objection, and held it to be sufficient, that the complainant had preferred a bill before the person who held the great seal, by whichever title he was styled. (1) So in the late case of Purcell v. Macnamara (2), in an action for a malicious prosecution, where the allegation was, that the defendant prosecuted an indictment against the plaintiff, until afterwards, to wit, on a certain day named, the plaintiff was in due manner acquitted, &c.; and, to prove this allegation, the record of acquittal was produced, which shewed that the acquittal was on another day, the Court held that the variance was not material, and that the averment had been substantially proved. Here the day

(1) R. v. Lookup, cit. 1 T. R. 240, 9 East, 163. R. v. Pippet, 1 T. R. 235. R. v. Payne, cit. 9 East, 158. R. v. Leefe, 2 Campb. 159. Byne v. Moore, 5 Taunt. 187.

(2) 9 East, 157. Philips v. Bacon, 9 East, 298.

If therefore the day laid in the declaration be material, it must be proved notwithstanding that it is laid under a videlicet. It is by no means generally true, that the omission of a videlicet will make it necessary to prove the particular sum or day, &c. strictly as laid. Some cases have been already mentioned, where a variance in the proof of such circumstances has been adjudged to be immaterial. (Vid. supra, p. 224.) It will be sufficient to add one other example. On an indictment for stealing goods in a dwelling-house, under the statute 12 Ann. st. 1. c. 7., it is not necessary to prove that the goods were of greater value than 40s., though that may be averred in the indictment without a videlicet. And see R. v. Burdett, 1 Ld. Raym. 149, R. v. Gillham, 6 T. R. 265. Gwinnett v. Phillips, 3 T. R. 643. and 2 Campb. 231.

was not alleged as part of the description of the record; but the substance of the allegation was, that the plaintiff had been acquitted on the prosecution. And "it was no more necessary," said Mr. Justice Lawrence, "to prove the precise day of the acquittal as laid in the declaration, than it is, upon an indictment for murder or in a declaration upon promises, to prove the precise day, as laid, of committing the murder or of making the promise." In this respect, it cannot be material whether the proof is by matter of record or by parol. If, indeed, the declaration had proceeded to state that the acquittal was on a certain day *as appears by the record*, that might have been considered as descriptive of the record, and then the variance would have been fatal. (1)

Variance in time.

It is a rule in pleading, that every material fact which is issuable and triable, must be averred to have happened at a certain time and place. (2) However, it will not generally be necessary to prove the time precisely as laid, unless that particular time is material. This is the constant course of proceeding in criminal prosecutions, from the highest offence to the lowest. In high treason, evidence may be given of an overt act either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. Objections of this kind, on behalf of the prisoner, have been repeatedly over-ruled. (3)

The same general rule applies, with as much reason, to civil suits. Thus in an action on a promissory note, where the declaration states that the defendant on such a day made, &c., proof that he made his promissory note on a different day would be sufficient. So in an action for assault, battery, taking of goods, &c., where the defendant pleads the general issue, the plaintiff will not be confined to the day stated in the declaration, but may prove the assault, &c. on

(1) 9 East, 161. And see Turner v. Eyles, 3 Bos. & Pul. 456. Wigley, v. Jones, 5 East, 440. Readshaw, v. Wood, 4 Taunt. 13. Com. Dig. tit. Record (C).

(2) 5 T. R. 620.

(3) Lord Balmarino's case; Lord Kilmarnock's case; Townley's case; State Trials. Fost. 8.

any other day before the commencement of the action. (1) If the defendant justifies by *son assault* on the same day, and the plaintiff traverses the cause of justification and at the trial the defendant proves the trespass on the same day, there the plaintiff cannot give evidence of an assault on another day. (2) And though the defendant should prove the assault of the plaintiff on another day, yet the plaintiff, after having made such a traverse, cannot prove another assault on a different day. (3)

Variance in place.

The same certainty of description, as to the place or parish, is not so necessary in local as in transitory actions. In an action for non-residence, where the parish was described as *St. Ethelburg*, and proved to be *St. Ethelburga*, it has been held, that the variance was fatal (4); so also it was, in an action of ejectment, where the premises were described as situate in the *united parishes of A. and B.*, but were proved to be in *the parish of A.*, and the two parishes were united only for the single purpose of maintaining the poor. (5) But where the premises were described as lying in the *parish of A. and B.*, and it appeared in evidence that part lay in A. and part in B., but that there was no such parish as *the parish of A. and B.*, the Court held, that the word *parish* was mere surplusage, and that the plaintiff was entitled to recover the lands in B. as well as in A. (6) So, where the premises were laid to be in the parish of *Farnham*, and were proved to be in the parish of *Farnham Royal*, but it did not appear that there were two *Farnhams*, the Court held that the variance was immaterial. (7) But if there had appeared to be another Farnham, there would have been an uncertainty. (8)

(1) Co. Lit. 282. a, b. 2 Roll. Ab. 687. 689. tit. Verdict, (N). Com. Dig. tit. Pleader, (S. 12.)
(2) Downes v. Skrymsher, Brownl. 233. 2 Roll. Ab. 687. l. 30. S. C.
(3) 2 Roll. Ab. 680, tit. Evidence (C), Art. 3. Thornton v. Lyster, Cro. Car. 514. contra, (Jones J. doubting,) Roll. Ab. Ib. See 2 Saund. 5. note 3.
(4) Wilson q. t. v. Gilbert, 2 Bos. & Pul. 281.
(5) Goodtitle dem. Pinsent v. Lammiman, 2 Campb. 274.
(6) Goodtitle dem. Bremridge v. Walter, 4 Taunt. 671. See Sir C. Morgan v. Edwards, 6 Taunt. 394. The case of Wilson v. Clark, therefore, (1 Esp. N. P. C. 273.) seems doubtful.
(7) Doe dem. Tollet v. Salter, 13 East, 9.
(8) Taylor v. Hooman, 1 Holt, 523.

In an action for use and occupation, where the premises were proved to lie in the parish of *St. Mary Lambeth*, but were described in the declaration as in the parish of *Lambeth*, which last was the name generally known, the variance was held to be immaterial (1): and this has over-ruled an older case, where a variance between the parish of *Chelsea*, and the parish of *St. Luke's Chelsea* was held at nisi prius to be fatal. (2) Although it is not necessary, in this action, to describe where the premises lie (3), yet if they are described in the declaration as situate in a certain parish, and are proved to be in a different parish, the plaintiff cannot recover. (4)

Where the parish or place mentioned is mere matter of venue, and not of local description, (as, in an action for a nusance defamatory to the plaintiff's character, where the declaration stated, that the defendant erected the nusance, complained of, in *the parish of A*, in a street adjoining to the plaintiff's house, &c.) the actual situation of the house is immaterial, and the plaintiff may recover, though it should be proved that there is no such parish. (5)

The same rule, which has been laid down with respect to civil actions, applies also to the case of an indictment; on the trial of which, it will be sufficient to shew, that the offence was committed in some place within the county or other division; and it seems to be agreed, says Mr. Serjt. Hawkins (6), that the mistake of the place in which an offence is laid will not be material upon the evidence, on the plea of not guilty, if the fact be proved at some other place in the same county. Although the offence must be proved to have been committed in the county, where the prisoner is tried, yet, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evi-

(1) Kirtland v. Pounsett, 1 Taunt. 570.
(2) And see 3 Taunt. 140.
(3) King v. Fraser, 6 East, 348.
(4) Guest v. Caumont, 3 Campb. 235. 6 East. 352.
(5) Jefferies v. Duncombe, 11 East, 226.; 2 Campb. 3. S. C. For other examples, see Drewry v. Twiss, 4 Term Rep. 558. Frith v. Gray, ib. 561. Comp. of Mersey & Irwell Nav. v. Douglas, 2 East, 497. Hamer v. Raymond, 5 Taunt. 789.
(6) B. 2. ch. 25. s. 84.

dence. This has been determined to be the rule in cases of high treason, and must equally apply to cases of conspiracy and felony. Where a felony is stated to have been committed at a certain place named in the indictment, and there is no such place in the county, the indictment is void. (1) *

Sect. VI.

That the best Evidence is to be produced, which the Nature of the Case admits.

The next general rule is, that the best evidence must be given, of which the nature of the thing is capable. (2)

The true meaning of this rule is, not that courts of law re-

(1) By 9 Hen. 5. st. 1. c. 1. made perpetual by stat. 18 Hen. 6. c. 12. Lamb. Just. B. 2. ch. 5. p. 391. Hawk. P., C. B. 2. c. 25. s. 84.

(2) Gilb. Ev. 13. Bull N. P. 293.

* The stat. 9 H. 5. st. 1. c. 1. after reciting, that many people by malice cause often the King's liege people to be appealed or indicted in divers counties of treasons or of felonies, supposing by the said appeals or indictments that the said treasons and felonies were done in a certain place in such county, where the indictment is made, or such place as is declared by such appeals, whereas there is no such place in the same county, enacts, that the process of the same be void and holden for none. In a case of felony, tried before Mr. Justice Lawrence, reported in 3 Campb. 73., an objection was taken, on the part of the prisoner, that there was not in the county any such parish as that laid in the indictment; in answer to which, it was contended on the other side, that, as the jury are to come from the body of the county, it is no longer necessary that any parish should be laid in the indictment Mr. Justice Lawrence reserved the objection for the opinion of the Judges; but, as the prisoner was acquitted, it became unnecessary to consider the point. It may be observed with respect to what was said in answer to the objection, that the challenge for hundreders, though now in disuse, (see 2 Hale, P. C. 272. 264.) does not appear to have been taken away. The statute 4 & 5 Ann. c. 16. s. 6. & 7. and st. 24 G. 2. c. 18. s. 3., which relate to the awarding of a *venire facias* of the body of the county, do not extend to indictments for treason or felony. And see Co. Lit. 125. a. n. 1. R. v. Burridge, 1 Stra. 593.

quire the strongest possible assurance of the matter in question, but that no evidence shall be given, which from the nature of the thing supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient and proves nothing, but carries with it a presumption contrary to the intention for which it is produced. (1) Thus, if a party offer a copy of a deed or will, where he is able to produce the original, this raises a presumption, that there is something in the deed or will, which, if produced, would make against the party; and therefore the copy in such a case is not evidence. But, if he prove the original deed or will to be in the hands of the adverse party, who refuses to produce it, although he has received a regular notice for that purpose, or that the original has been lost or destroyed without his default, no such presumption can reasonably be made, and a copy will be admitted, because then such copy is the best evidence that can be produced. (2)

Parol evidence is not admissible to prove the contents of a licence to trade, granted from the crown, though the licence is lost, because there must be some register of it at the secretary of state's office, and that register would be better than parol evidence. (3) So, the discharge of a party under an insolvent debtors' act cannot be proved by parol evidence, not even by proof of the acknowledgment of the party; for the discharge may have been irregular and void; and the party may be mistaken; a judicial act of this kind can only be proved by calling the clerk of the peace, and giving in evidence the order of the court, by which the discharge was effected. (4)

(1) Gilb. Ev. 15.

(2) Gilb. Ev. 15. Bull. 293. Garnons v. Swift, 1 Taunt. 507. R. v. Hube, Peake, N.P.C. 131. R. v. Doran, 1 Esp. 127. Molton v. Harris, 2 Esp. 548. Henry v. Leigh, 3 Campb. 499., stated infra See post, part 2. ch. 8. sect. 2. as to the admissibility of secondary evidence in the case of written instruments.

(3) Rhind v. Wilkinson, 2 Taunt. 237. Eyre v. Palsgrave, 2 Campb. 605.

(4) Scott v. Clare, 3 Campb. 236. by Lord Ellenborough. Action of assumpsit; the general issue pleaded; the defence was, that the plaintiff had been so discharged after the cause of action had accrued, and before the commencement of the suit.

This principle is strongly illustrated by the case of Williams v. the East India Company (1), where the question was, whether the defendants had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature. It appeared in evidence at the trial, that the goods were delivered by the officer of the defendants, with a written order to the plaintiff to receive them, in which order nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died; and that no other person was present at the time of the delivery. It was further proved, by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person on board. Upon this evidence the plaintiff, who had to prove the negative, was nonsuited, on the ground, that he had not given the best evidence of the want of notice, which it was in his power to produce, by calling the company's officer, who delivered the articles on board. And the nonsuit was afterwards affirmed by the Court of King's Bench. "The best evidence," said Lord Ellenborough, in delivering the opinion of the Court, "should have been given, of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering and in the receiving of the goods on board, who appear in this case to have been the first mate, on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely, the presumption and inference arising from a non-communication to the other persons on board,) as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the pro-

(1) 3 East, 193. 201.

per and primary evidence on the subject, is suggested to exist in this case."

It has been already observed, that although the best evidence is to be given which the nature of the case admits, yet the strongest possible assurance of a fact is not required. If a deed, for example, is attested by several subscribing witnesses, the execution may be proved by one of them: or, if none of those witnesses can be produced, proof of the signature of one witness will be sufficient; for the proof is, as far as it goes, complete, and not inferior, in its kind, to any that can be produced; nor can it be inferred merely from the absence of further proof of the same kind, that such additional proof would be inconsistent with that already produced. So, to prove the plaintiff's demand satisfied, the defendant may give evidence of an admission by the plaintiff to that effect, though it should appear that the plaintiff also signed a receipt, and it may be said the receipt would be more satisfactory proof. (1) And, where an agent for the plaintiff made a verbal agreement with the defendant, and afterwards put it down in writing, which was not signed by the parties, as a memorandum to assist his recollection, such writing is not the best evidence, nor indeed any evidence of the agreement, though it may be used by the agent for the purpose of refreshing his memory. (2) So, if parol evidence should be offered to prove a tenancy, it is no objection that there is some written agreement relative to the holding, unless it should appear that the agreement was between the landlord and tenant, and that it continued in force to the very time, to which the parol evidence applies. (3) And in a great variety of cases, which have been before mentioned (4), *primâ facie* or presumptive

(1) Jacob v. Lindsay, 1 East, 460. Smith v. Young, 1 Campb. 439.

(2) Dalison v. Stark, 4 Esp. N. P. C. 163. 1 East, 460. Ramsbottom v. Tunbridge, 2 Maule & Sel. 434.

(3) Doe d. Wood v. Morris, 12 East, 237. Doe v. Pearson, 12 East, 239. n.

(4) Ch. 7. sect. 2. The following examples may be added, from actions on promissory notes, and bills of exchange. Porthouse v. Parker, 1 Campb. 82. Taylor v. Jones, 2 Campb. 105. Gibbon v. Coggon, do. 188. Helmsley v. Loader, do. 450. Jones v. Morgan, do. 474. Greenway v. Hindley, 4 Campb. 52.

proof is admissible, although perhaps stronger evidence might have been produced.

Upon the same principle, it will not be necessary to call the supposed writer of an instrument, for the purpose of proving or disproving his hand-writing; but the evidence of persons well acquainted with the character of his writing will be sufficient. Such evidence is not, in its nature, inferior or secondary; and though it may generally be true, that a writer is best acquainted with his own hand-writing, and therefore his evidence will generally be the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of an inferior or secondary species; nor does it give any reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. It is the common practice to receive such testimony in ordinary cases; and in prosecutions for capital offences, it must be equally admissible. On a prosecution for the forgery of a bank-note (1), therefore, Mr. Justice Le Blanc held that the signature in the name of the cashier of the Bank might be disproved by any other person, who was acquainted with his hand-writing, though the cashier himself was not an incompetent witness. (2)

A smaller quantity of proof and more general evidence will be allowed, where the certainty of the fact lies within the knowledge of the other party. All evidence, observed Lord Mansfield (3), is to be weighed according to the proof which it is in the power of the one side to produce, and in the power of the other to contradict. In an action against the sheriff, for taking insufficient pledges in replevin, slight evidence on the part of the plaintiff, as to the insufficiency, will be admitted to

(1) Hughes's case, 1802, 2 East, P. C. 1002.; M'Guire's case, 1801, S. P. ib. Contra, Smith's case, 1768, 2 East, P. C. 1000. See post. part 2. chap. 8. sect. 2. as to proof of hand-writing.

(2) Newland's case, 2 East, P. C. 1001.

(3) Blatch v. Archer, Cowp. 63.

cast the burthen of proof on the defendant, who must be supposed to know the sureties, and whose duty it was to inquire into their sufficiency. (1)

The rule, which requires the best evidence to be produced, is dispensed with in some particular cases.

1. Where it is necessary to prove an entry in a public book, the original need not be shewn; but, from a principle of general convenience, an examined copy will be admitted. (2)

1. Entry in public book.

2. In the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove, that they acted in these characters, without producing their appointments. (3) And in the case of officers of any branch of the revenue, where the question is whether they are such, proof of being reputed to be so, or of having exercised the office, is good evidence of the fact, on any indictment, information, action, or prosecution. (4) So, on an indictment for perjury, committed by the defendant before a surrogate in an ecclesiastical court, proof that the person, who administered the oath, acted as surrogate, has been held to be sufficient *primâ facie* evidence of his appointment and authority. (5) On an information against a military officer for making false returns, it is sufficient to prove, that he acted in the character alleged in the charge, without adducing direct evidence of his appointment. (6) And in action for penalties against a collector of taxes, proof of his collecting the taxes is sufficient proof of his being collector, though his appointment is by warrant under an act of parliament. (7)

2. Proof of being a public officer.

3. There are other instances in which strict proof is made unnecessary, because the party, against whom it would otherwise be requisite to produce proof of the particular fact, has by

3. Strict evidence dispensed with, by admission of party.

(1) Saunders v. Darling, Bull. N. P. 60.
(2) See part 2. ch. 6. *ad finem*.
(3) By Buller J. in Berryman v. Wise, 4 T. R. 366. By the opinion of all the judges in the case of the Gordons, tried for murder in 1789, Leach, Cr. C. 585.
(4) St. 26 G. 3. c. 77. s. 13., and see St. 11 G. 1. c. 30. s. 32.
(5) R. v. Verelst, 3 Campb. 432. R. v. Creswell, Lond. Sitt. after Mich. 1816, S. P.
(6) R. v. Gardner, 2 Campb. 513.
(7) Lister, q. t. Priestley, Whitwick, Rep. 67.

his conduct precluded himself, in the way of estoppel, from disputing the fact. (1) There are few cases, indeed, in which a person's acts operate against him as an estoppel, though they may often be used as good *primâ facie* evidence against him. (2) Such is the rule in an action against clergymen for non-residence, in which it is reasonable, that the acts of the defendant as parson, and his receipt of the emoluments of the church, should be evidence against him of his being parson, without formal proof of his title. (3) And in action by a person, as farmer and renter of tolls, appointed under an act of parliament, for tolls due at a turnpike-gate, although the plaintiff will not be entitled to recover on the special count, unless he has been legally appointed collector of the tolls, yet, if the defendant has accounted with him in that character, the want of a formal appointment will not preclude him from recovering on an account stated. (4)

This principle was carried farther in the case of Radford q. t. v. M'Intosh; too far, indeed, in the opinion of one learned Judge. (5) That was an action for penalties under the post-horse act, brought by the plaintiff as farmer-general, and proof of his appointment was dispensed with, because the defendant had previously accounted with him as farmer-general. (6) In an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to the tithes is sufficient evidence, as against the defendant a wrong-doer. (7) And in an action against the defendant for slander, in charging the plaintiff with being a swindler, and threatening that he would have him struck off the roll of attornies, the Court was of opinion, that the defendant's threat amounted to a distinct

(1) By Chambre J., Smith v. Taylor, 1 Bos. & Pul. N. R. 210.; and see the cases cited ante, p. 92.

(2) By Chambre J. Ib.

(3) By Chambre J., 1 New Rep. 210. Bevan q. t. v. Williams, n. (a) 3 T. R. 635.

(4) Peacock v. Harris, 10 East, 104.

(5) Chambre J., 1 Bos. & Pull. N. R. 211. And Mansfield C. J. doubted, whether further proof would not have been necessary; ib. p. 205.

(6) 3 T. R. 632. And see Cross v. Kaye, 6 T. R. 663. and 1 New Rep. 211.

(7) 1 Bos. & Pull. N. R. 210. 3 T. R. 555. 4 T. R. 366. Chapman v. Beard, 3 Anstr. 492. 4 Gwill. 1483. S. C.

acknowledgment that the plaintiff was an attorney, and dispensed with further proof. (1)

The principle to be extracted from these cases seems to be, that where a defendant, in the course of the transaction, on which the action is founded, has admitted the title, by virtue of which the plaintiff sues, it amounts to *primâ facie* evidence, that the plaintiff is entitled to sue. (2) And upon this principle two of the Judges of the Court of Common Pleas were of opinion, that the plaintiff was entitled to recover in the case of Smith v. Taylor. (3) That was an action for defamation, in which the plaintiff averred, that he was a physician and exercised the profession, and that the words were spoken concerning him as a physician. The material facts of the case were shortly these: the plaintiff, having practised in the profession of a physician, was called upon to attend a sick person, for whom he prescribed; the defendant was employed as apothecary, and made up the prescription; in this situation of things, the defendant spoke the words charged in the declaration, which did not impute to the plaintiff any want of qualification by degree, but called him by his professional title of doctor, and ascribed to him mal-practice in his treatment of the patient. "The question," said the Chief Justice, "is, whether, in this particular action upon these particular words, the evidence offered was not sufficient *primâ facie* evidence, that the plaintiff had lawfully practised as a qualified authorised doctor of physic? And considering the nature of the words, and the situation of the defendant, that the charge had no relation to the want of qualification, but merely to the practice, and that it was accompanied by the expression 'Dr. S.,' I think that these circumstances afforded sufficient *primâ facie* evidence that the plaintiff was doctor." On the other hand, if the words imply a charge, that the plaintiff was not qualified to act in the particular character which he assumed, it has been held that

(1) Berryman v. Wise, 4 T. R. 366.

(2) By Heath J. 1 New Rep. 208.

(3) 1 New Rep. 196, by Mansfield C. J. and Heath J.; but Rook J. and Chambre J., were of opinion that the words did not admit the qualification.

the qualification ought to be proved, and that it will not be sufficient to shew that he acted in that capacity. (1) And where the words imply merely ignorance or negligence, without admitting the plaintiff to be qualified, and the plaintiff avers that he is qualified, he will be bound to prove his qualification. (2)

The proof of an admission of a fact by a party to the suit has, in many cases, been considered sufficient to dispense with the strict and regular proof, which would otherwise have been necessary. *If* a lessee acknowledges that he has assigned the lease to another person, this is evidence against him of his having transferred all his interest in the premises, though an assignment can only be effected by some instrument in writing. (3) And an admission by the defendant, that a third person had become a bankrupt, is evidence of the bankruptcy, in an action brought by the assignee of the bankrupt; and will dispense with the necessity of going through the formal proof of the trading and act of bankruptcy, as in ordinary cases. (4) So if the defendant has acknowledged, that he agreed to pay a certain sum of money for tithes leased to him by the plaintiff, this will entitle the plaintiff to recover, in an action of debt on a composition for tithes, although it appear that the agreement is in writing and in the plaintiff's possession.

4. Proof of publication of newspapers.

4. The strictness and particularity of proof, which would have been requisite by the common law, is now in many instances dispensed with, under the provisions of several acts of parliament. One instance, relative to the appointment of officers of the revenue, has been already noticed. Another instance occurs in proceedings against persons concerned in

(1) See the judgment of Mansfield Ch. J. in 1 New Rep. 204. 207. Pickford v. Gutch, 8 T. R. 305. n. (a); Moises v. Thornton, 8 T. R. 303.

(2) See 1 New Rep. 204. 210.

(3) Doe. dem. Lowden v. Watson, 2 Starkie, 230.

(4) Maltby assignee of Durouveray v. Christie, 1 Esp. 340.; cited 16 East, 193. Dickenson assignee of Booth v. Coward, 1 Barn. Ald. 677. See the case of Scott v. Clare, supra, p. 233., where it was held, that the acknowledgment of the party would not dispense with the formal proof of a discharge under an insolvent debtor's act

the publication of newspapers. The various proofs in these proceedings are much facilitated by a late act of parliament (1), the principal object of which was to prevent the mischiefs arising from the printing and publishing of newspapers by persons unknown. That act declares it illegal S. 1, 2. 5.
for any person to print or publish a newspaper, until there has been delivered to the commissioners for stamp-duties at their head-office, or to some officer appointed by them for this purpose, an affidavit or affirmation in writing, signed by the person making it, specifying the true names, additions, descriptions, and places of abode, of every person intended to be printer or publisher, as well as of the proprietors of the newspaper, the true description of the house where the paper is intended to be printed, and the title of the paper. (2)—The 9th section enacts, that these affidavits shall be kept as the S. 9.
commissioners direct, and that they, or certified copies of them, shall, in all civil and criminal proceedings touching any newspaper there mentioned, be admitted as conclusive evidence of the truth of the matters set forth in the affidavits, against every person who has signed and sworn, and shall also be admitted as sufficient evidence of the truth of such matters against every person therein mentioned to be a proprietor, printer, or publisher, unless the contrary shall be satisfactorily proved.—The 11th section enacts, that after S. 11.
producing in evidence such affidavit or a certified copy, and after producing a newspaper, entitled in the same manner as the newspaper mentioned in the affidavit, and in which the names of the printer and publisher, and the place of printing, are the same as those mentioned in the affidavit, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by the act, to prove that the paper was purchased at any house or office, belonging to or occupied by the defendant, or by his servants or workmen, or where he usually carries on the business of printing or publishing the paper, or where the same is usually sold.—The 13th section further enacts, that S. 13.
the commissioners or officers, by whom the affidavit is kept,

(1) St. 38 G. 3. c. 78.

(2) Sect. 1, 2, 5.

upon application to them by any person requiring a certified copy of the affidavit, in order that it may be produced in any civil or criminal proceedings, shall deliver such certified copy
S. 14. to the person applying.—The 14th section, after reciting the public inconvenience which must result from obliging the officers to attend personally for the purpose of proving the signing and swearing of the parties, enacts, that in all cases a copy of any such affidavit or affirmation, certified to be a true copy, under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, shall, upon proof made that such certificates have been signed with the hand-writing of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, or officer or officers, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and such copies, so produced and certified, shall also be received as evidence, that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this act, and shall have the same effect, for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations, of which the copies so produced and certified shall purport to be copies, had been produced in evidence, and been proved to have been duly so certified, sworn, and affirmed, by the person or persons appearing by such copy to have sworn or affirmed the same as
S. 17. aforesaid.—The 17th section requires the printer or publisher to deliver to the commissioners at their head office, or to officers appointed by them, one of the papers signed by the printer or publisher, with his name and place of abode; and further enacts, that in case any person shall make application to the commissioners or to such officers, in order that such newspaper or other paper, so signed by the printer or publisher, may be produced in evidence in any civil or criminal proceeding, the said commissioners or such officers shall, at any time within two years from the publication, either cause the same to be produced in the court in which it is required to be produced, and at the time when it is required to be produced, or shall deliver the same to the party applying for it, taking, accord-

ing to their discretion, reasonable security at his expense, for returning the same to the said commissioners or such officer.

It has been determined, in the construction of this act, that an affidavit containing all the particulars required by the act, together with a copy of a newspaper produced from a stamp office, containing the libel, and corresponding exactly with the description in the affidavit, is not only evidence of the publication by the parties named, but also that the paper was published in that particular county, where the affidavit specifies it to have been printed.(1) This would be good evidence of such a publication under the 9th section, without the aid of the 11th section, which last renders it most clearly admissible. The publication may be proved by the original affidavit, signed by the defendant as the sole proprietor of the paper, and specifying the place where it was intended to be published, together with proof that a copy of the paper, containing the alleged libel, had been there purchased.(2) If a certified copy of the affidavit is produced in evidence, purporting to have been sworn before a distributor of stamps in the country, it ought to be proved that he had authority to take the affidavit, unless the affidavit itself state the fact; if the *jurat* purport that the officer had such authority, further proof will not be necessary.(3)

Sect. VII.

That Hearsay is not Evidence.

It is a general principle in the law of evidence, that if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness as to his means of knowledge and concerning all the particulars of the fact.

(1) R. v. Hart and White, 10 East, 94.

(2) R. v. White, 3 Campb. 100.

(3) Id. 99.

Hearsay evidence of a fact, therefore, is not admissible. And the same principle is applicable to statements in writing, no less than to words spoken: whether spoken or written, they are equally inadmissible in evidence. The only difference between them in this respect is, that there is a greater facility of proof in the one case than in the other; a written account is proved to be genuine, by proof of the hand-writing; but the genuineness of mere oral declarations must depend upon the memory and accuracy of the witness, who professes to repeat them.

Exceptions.

To this general rule there are some exceptions, which will be separately considered.

On question of pedigree, &c.

First, with regard to hearsay on questions of pedigree. "On enquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rules of evidence applicable to modern facts of the same description, on account of the great difficulty of proving those remote facts in the ordinary manner, by living witnesses. On this principle, hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact, handed down from one to another,) have been admitted as evidence in cases of pedigree." (1) Thus, declarations of deceased members of a family are admissible evidence to prove relationship; as, who was a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage or of the birth of a child, and the like, of which it cannot be reasonably presumed, that better evidence is to be procured. In ancient times, while the feudal system prevailed, great facilities of establishing descents were afforded by means of inquisitions post mortem. The heads of families, upon these occasions, made solemn declarations, which were preserved as matter of record. (2) But, these having now grown into disuse, it is often extremely difficult to prove a

(1) By Le Blanc J. in Higham v. Ridgway, 10 East, 120. And see the Lord Chancellor's judgment in the case of Vowels v. Young, 13 Ves. jun. 143; and the opinions of the judges in the Berkeley Peerage case, 4 Campb. 404—421.

(2) 13 Ves. jun. 143. Bull. N. P. 294.

pedigree; and recourse must be had, from necessity, to the best evidence that the nature of the subject will admit. In a late case, proof by one of the family, that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married, was considered by the Court of King's Bench, good primâ facie evidence of the person's death without lawful issue. (1)

It is not, however, every statement or tradition, that can be admitted in evidence. "The tradition," said Lord Eldon, in the case of Whitlocke v. Baker (2), "must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. Declarations in the family, descriptions in wills, descriptions upon monuments, in Bibles and registry books, are all admitted, upon the principle that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position without any temptation to exceed or fall short of the truth."

Descriptions in family-bibles have been mentioned only by way of example. The admissibility of such entries, it is scarcely necessary to observe, can in no degree depend upon the circumstance of their being inserted in the family Bible, though on that account the statement may be entitled to greater consideration. A memorandum inserted in any other book, by one of the family, may be given in evidence. So, a will by an ancestor is evidence on a question of pedigree, (though it be found cancelled, and not known to have been proved or acted upon,) if it appears to be treated as a paper relating to the family. (3) And recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees

(1) By dem. Banning v. Griffin, 15 East, 293. Doe dem. George v. Jesson, stated ante, p. 212.

(2) 13 Ves. 514. Edwards v. Harvey, 1 Cooper, Ch. Rep. 39.

(3) Doe dem. Johnson v. Lord Pembroke, 11 East, 505.

hung up in a family mansion, and the like, (in which it is improbable that a description would be suffered to continue, if erroneous,) are all of them admissible upon the same principle. (1)

Declarations made by a deceased husband, as to the legitimacy of his wife, are evidence, though he was not related to her by blood; for the husband must be supposed to have more intimate knowledge on that subject, than a distant relation. (2) But the opinion of deceased neighbours, or of acquaintances of the family, are not evidence on a question of pedigree (3); nor is the hearsay of a relative to be admitted, when the relative himself can be produced. (4)

Declarations *post litem motam.*

The declarations of a deceased member of the family are not to be admitted, unless, as was before mentioned, they have been made under circumstances, when the relation may be supposed without an interest and without a bias. If they were made on a subject in dispute, after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received in evidence, on account of the probability, that they were partially drawn from the deceased, or perhaps intended by him, to serve one of the contending parties. There has been some difference of opinion on this subject. In a case reported in Viner's abridgment (5), Ch. B. Reynolds refused to admit declarations, which had been made at a time when the point had become the subject of controversy. On the other hand such evidence was received by Lord Camden (6); and Lord Mansfield, in the case of Goodright on the demise of Stevens v. Moss (7), was of

(1) 13 Ves. jun, 144. Bull. N. P. 233. Cowp. 594. 10 East, 120.

(2) Vowels v. Young, 13 Ves. jun. 148.

(3) 13 Ves. jun. 147. 514. 3 T. R. 723. See Bull. N. P. 295. 1 Maul. & Sel. 689. 14 East, 330.

(4) Pendrel v. Pendrel, 2 Str. 924. Bull. N. P. 113. Harrison v. Blades, 3 Campb. 457.

(5) Dev. Sp. Ass. 1731, Vin. Ab. Ev. [T. b. 91.]

(6) Hayward v. Firmion, Sitt. after Trin. term, 1766; cited by Lawrence J. in the Berkeley peerage case; and see Nichols v. Parker, Exr. Sp Ass. 1805, 14 East, 331. n.

(7) Cowp. 594.

opinion, that an answer * by a deceased mother to a bill filed against her, stating the time of a child's birth, might be admitted as evidence on the footing of a declaration. On the trial of the cause, Mr. Baron Eyre rejected this answer, together with the general declarations of the father and mother; in consequence of which, an application was made to the Court of King's Bench for a new trial. Lord Mansfield, on that occasion, considered the rejection either of the general declarations, or of the answer, to be a sufficient ground for a new trial: but he adverted more particularly to the former; and it does not appear from the report, that he laid any great stress on the rejection of the answer. Mr. Justice Aston concurred with Lord Mansfield in opinion, that the general declarations ought to have been admitted, but delivered no opinion on the other point. Thus, the authorities on this subject appear to have been, at one time, nearly evenly balanced.

Great light has been thrown upon this subject by the opinions of many of the Judges in the late case of the Berkeley peerage.(1) A question was on that occasion proposed to the Judges (2), in the following terms: "Upon the trial of an ejectment respecting Black Acre between A. and B., (in which

(1) May 13, 1811, MS. 4 Campb. 401. S. C. See also the case of the Banbury peerage claim, 1809, 2 Sel. N. P. 684.

(2) May 2, 1811. MS.

* The answer is described by the reporter of this case as an answer in Chancery. It appears from an enquiry, which was made in the case of the Berkeley peerage, that proceedings had been instituted in the Court of Chancery, and that afterwards a bill was filled in the Exchequer, by the younger son, claiming as a legitimate child, against the mother who was administratrix of her deceased husband. The mother in her answer averred, that the complainant was born before marriage and illegitimate. Now as she was entitled as administratrix to a distributive share of the husband's effects, and was therefore interested to defeat the right of any other persons, who might claim a part under the distribution, her answer most clearly ought not to have been admitted. This objection, however, was not adverted to; nor does it seem to have occurred, that the statement in the answer was inadmissible, as having been made after the commencement of a suit.

it was necessary for A. to prove that he was the legitimate son of J. S.) A., after proving by other evidence that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in Chancery, instituted by A. against C. D. in order to perpetuate testimony to the alleged fact (disputed by C. D.,) that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D. B., the defendant in the ejectment, did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit. According to law, could the deposition of J. S. be received in evidence upon the trial of such ejectment against B., as evidence of declarations of J. S., the alleged father, in matters of pedigree?" The Judges, who were present, afterwards stated their opinions at length, and, with only one dissentient voice, agreed in considering the deposition of J. S. to be inadmissible. Mr. Justice Lawrence delivered his opinion in the following terms (1): "The declarations of members of the family, in matters of pedigree, are generally admitted from the necessity of the case; but the administration of justice would be perverted, if such declarations could be admitted, which have not a presumption in their favour, that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, (which may be fairly inferred before any dispute upon it has arisen,) we may reasonably suppose, that he neither stops short, nor goes beyond the limits of truth, in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and deli-

(1) 4 Campb. 409.

vered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in the case of Goodright v. Moss, I cannot think that Lord Mansfield would have held, that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice, (an experience of nearly forty years,) whenever a witness has admitted, that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in the cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value." Then, after referring to the decided cases, the learned Judge added,— "The authorities being thus balanced, I think the point must be considered as without any decision, and we must resort to principle and the uniform practice, which has obtained in questions of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds, which would be practised upon them, if a contrary rule were to prevail. That this is not an imaginary apprehension, will occur from what happened in the Douglas and Anglesea causes; in the first of which, fabricated

letters were given in evidence; and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced, who swear in direct contradiction, the one to the other; and it may be feared, that persons, who have as little regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good-will, tempt many, who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely after the commencement of the law-suit, but after the dispute has arisen, (that is the primary meaning of the word *lis*,) are evidently more likely to mislead the jury than to direct them to a right conclusion, and therefore ought not to be received in evidence. I am likewise of opinion, that no deposition can be received in evidence as a declaration, to prove a fact, which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories as it is thought expedient to put to him, to establish certain facts which the plaintiff alleges, and on which the case depends. Consequently, a deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination; and on that account, all admit that against a stranger it cannot be received in evidence as a deposition. How then shall it be received as a declaration? In that case, the circumstance of its being upon oath cannot be regarded. To consider it a declaration on oath, would be to receive it as a deposition. As a declaration, it is still subject to the same vice and infirmity, of being an answer to particular questions artfully put, with an interested view, by one party behind the back of the other. All the objections, on which it is allowed that this document cannot be received as a deposition, apply with at least equal strength to receiving it as a declaration."

In a later case, also, at *nisi prius*, where the question was, whether the occupier of a particular farm was liable to the repair of a public road, and, to prove the affirmative, an award was produced, (which had been made some years before, when the same question was the subject of dispute between the township, where the lands were situated, and a former occupier,) this evidence was rejected as inadmissible; on the ground, that the account, which deceased witnesses might have given to the arbitrator on that occasion, could not have been received, as the declarations were made *post litem motam*, and that the opinion of the arbitrator, formed upon such testimony, could not be entitled to more credit. (1)

Deposition in a former suit upon a different custom.

The same principle applies equally to depositions relating to manorial customs; which therefore are not admissible in evidence, when precisely the same custom, as is the subject-matter of the existing suit, was contested in the former suit in which the depositions were made. But where the two suits are not upon the same custom, the depositions taken in the former suit are not liable to objection, as being made *post litem motam*; and where the former suit is very ancient, it will be unnecessary to prove by extrinsic evidence, that the witnesses who made the depositions, were in the situation in which they profess to stand, or that they had the means of becoming acquainted with the customs of the manor. A question of this kind lately occurred in the case of Freeman v. Phillipps (2); where depositions in an ancient suit, as to a copyhold custom, were adjudged to be admissible. The former suit was instituted against the lord of a manor, by a person who claimed to be admitted to a copyhold for lives, upon a custom for any *copyhold tenant for life or lives* to change or fill up his lives, *paying to the lord a reasonable fine to be set by the lord or his steward.* The subsequent suit was an action by a copyholder against a lord of the same manor, and the question was, whether there existed in the manor such a custom, as the plaintiff claimed, in respect of copyholds granted for two lives, that the surviving life should renew, *paying to the lord such*

(1) R. v. Cotton. 3 Campb. 444. before Dampier J.

(2) 4 Maule & Selw. 486.

fine as should be set by the homage equal to two years' improved value. It was not proved, farther than by the record itself, that the litigating parties in the former suit were (as they claimed to be) lord and copyholder, or that the persons, making the depositions, were such as they represented themselves to be in the depositions. These depositions were offered in evidence on behalf of the defendant, as showing that, at the time of the former suit at least, no such custom as the present was ever set up, but that the custom, which was applicable to all copyholders for lives (and therefore to copyholders for two lives,) was, that the copyholder should renew on payment of a fine to be set by the lord or his steward, without mentioning any thing of the intervention of the homage or jury, and that such intervention was not an ingredient in the custom. The objections against the reading of the depositions were, first, that the former suit was *res inter alios acta*; and, secondly, that the depositions were not admissible as declarations, having been made *post litem motam.* But the Court of King's Bench determined, that the depositions had been properly admitted in evidence. With respect to the first objection, Lord Ellenborough C. J. said, — "Considering these depositions as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but little effect, if we did not attribute to it verity in many of the particular matters which it contains, such as, that the parties litigant were clothed with the rights, in which they profess to stand, and were agitating the claim put forward on the record. It appears then, that in 1693 a copyholder of this manor, or a person claiming at least to be a copyholder, was engaged in a suit with the lord, and in the course of that suit produced persons, who appear to have stood *in pari jure* or *in eodem jure*, and who made their depositions in support of the claim. These depositions I consider to be evidence, as being made by persons standing *in pari jure*; and so they have been considered at all times. They furnish evidence not only against the parties making them, but against all persons standing in the same relation." And, as to the second objection, Mr. Justice Le Blanc said, — "One answer to the objection (of their having been made *post litem motam*) is this, that treating the depositions as hearsay evidence only, still they are not to be consi-

dered as made *post litem motam*, because the same thing is not in controversy now, that was in controversy in the former suit; the two customs, which gave rise to the two suits, are different. And the strong ground of observation, which arises upon these depositions, is, not that they are evidence of any particular thing, which the witnesses have affirmed, but that at a time when a dispute existed between the lord and his copyholder concerning the copyholder's right to renew on certain terms, it was never made a term that the fine should be assessed by the jury. I do not see how in this point of view it can be said, that this was not evidence applicable to the issue; and it seems also to me to stand clear of objection, either on the ground of its being a declaration made after the commencement of a suit touching the matter in question, or on the other ground, that we ought to look for evidence *aliunde* to make it admissible."

Hearsay as to time of birth.

On a question, whether a testator at the time of making his will was of full age, a written memorandum by his deceased father, stating the time of his birth, has been admitted to be good evidence. (1) Here the controversy was not, as in a question of pedigree, from what parents he derived his birth, but at what precise time an undisputed birth had happened. Still however the observation, before made, applies to this sort of evidence, namely, that the father had peculiar means of knowing the fact in dispute without any interest to misrepresent it, and the fact itself was not a matter of notoriety, but necessarily lying within the knowledge of a few individuals of the family. So, on a question of legitimacy, the declarations of deceased persons, supposed to have been married, (who might themselves be examined, if alive,) are admissible to disprove the fact of marriage. (2)

Hearsay as to place of birth, &c.

The declarations of a deceased parent, though they are evidence of the time of a child's birth, will not be admitted

(1) Herbert v. Tuckal, Tr. at bar, Sir T. Raym. 84. cited in Brune v. Rawlins, 7 East, 290.; and see 10 East, 120.

(2) R. v. Bramley, 6 T. R. 330. May v. May, 1762, Tr. at bar, Bull. N. P. 112.

as evidence of the place of the birth. (1) "The point in dispute," said Lord Ellenborough, in a case where the admissibility of such evidence was discussed, "turns on a single fact, involving only a question of locality, and therefore not falling within the principle of the rules applicable to cases of pedigree." Nor can the declarations of a father or mother be received after their deaths to prove the want of access, so as to bastardize a child born during the marriage; for they could not be examined to that fact, if alive (2); and, even if that objection were removed, still the case would not come within the principle, on which such hearsay evidence can be made an exception to the general rule; as want of access (3), implying the continued separation of the parties, must be notorious to the whole neighbourhood, where they have resided, and is therefore capable of more satisfactory proof. For the same reason, the declaration of a deceased person, as to having been believed by a parish (4), or as to being hired for a year (5), are not evidence of those facts, on an appeal against an order of removal.

The case, in which the declaration of a parent was received as evidence of the time of a child's birth, has been before mentioned. From analogy to this, the declaration or written memorandum of a deceased surgeon, respecting the time of a birth at which he attended, appears to be evidence, as having been made on a matter peculiarly within his knowledge. (6) And, for the same reason, the account, which a deceased person has given respecting his own bodily state during illness, or immediately after an injury, is admissible. (7) In the case of Aveson v. Lord Kinnaird (8), which was an action upon a life-insurance of the plaintiff's wife,

(1) R. v. Erith, 8 East, 542.
(2) R. v. Reading, Rep. temp. Hard. 79. Stapleton v. Stapleton, ib. 277. Bull. N. P. 113. S. C. Stevens v. Moss, Cowp. 592. R. v. Luffe, 8 East, 203. R. v. Kea, 11 East, 133. See supra, p. 154.
(3) Bull. N. P. 113.
(4) R. v. Chadderton, 2 East, 29.
(5) R. v. Nuncham Courtney, 1 East, 373. R. v. Ferry Fristone, 2 East, 55. R. v. Abergwilly, 2 East, 63.
(6) See 10 East, 120. and Vin. Ab. Ev. T. b. 91.
(7) Aveson v. Lord Kinnaird, 6 East, 193. 198. Thompson and Wife v. Trevannion, Skin. 402.
(8) 6 East, 188.

and where the question was, whether her life was in an insurable state, the account which she gave of herself, explaining her appearance, in answer to enquiries a few days after the certificate of her health had been obtained, and her account also of the state, in which she had previously been at the time of obtaining the certificate, were received at the trial and afterwards adjudged by the Court of King's Bench to be admissible evidence, for the purpose of showing, that the wife was not in the state of health described in the certificate. The substance of the conversation was, that she had continued ill from the time of obtaining the certificate down to the time when the conversation took place; and the declarations were held to be admissible, in the first place, as showing the opinion, which the deceased had of her own state of health, when the certificate was made out; and secondly, they were properly received as evidence to contradict a surgeon, who had been called on the part of the plaintiff. So, to prove seisin in a devisor, the declarations of a deceased occupier of the land in question, that he held as his tenant, were received as evidence of that fact. (1) Without such evidence it might have been impossible to prove an occupation by the deceased tenant under a particular person, though the simple fact of his occupation must have been capable of other proof; and, in addition to the circumstance of his having a peculiar knowledge of the fact, it may be observed, that the declaration was in some degree against his interest, since, in case of an action by his landlord, it might have been produced as evidence against him, or against any claiming under him. (2) For the same reason, where the point was, whether certain lands were parcel of A.'s or B.'s estate, the declarations of a deceased occupier, who held under both A. and B., have been admitted in evidence. (3)

In questions upon a boundary between parishes or ma- Hearsay as to boundaries, customs, &c.

(1) Holloway v. Rakes, cited by Buller J. in Davies v. Pierce, 2 T. R. 55. Uncle v. Watson, 4 Taunt. 16.

(2) 4 Taunt. 16.

(3) Roll v. Fellow, before Lord Hardwicke C. J. Exr. Sp. Ass. 1735. Vin. Ab. Ev. [A. b. 38.] pl. 10. Sir J. Bridgman v. Jennings, 1 Ld. Raym. 734. Davies v. Pierce, 2 T. R. 53.

nors (1), or on a customary right (2), or on parochial, or manorial customs (2), declarations as to the common opinion of the place, made by deceased persons, who from their situation had the means of knowledge and no interest to misrepresent, have been generally considered admissible evidence. So, perambulations are evidence of the extent of a particular parish or manor; since it may be inferred that those who perambulated, believed the line of their perambulation to be the boundary of the district, and such acts are in some measure an exercise of the right. (3) Such evidence has been admitted from analogy to cases of public rights, in which it is clearly established that reputation is admissible. (4) A right of common by custom is, strictly speaking, a private right; but it is also a general right, and therefore (so far as it regards the admissibility of this species of evidence) has been considered as public, because it affects a large number of occupiers within a district. But it is to be observed, the evidence is to be confined to what such old persons have said, as were in a situation to know what the rights were; and before a customary right can be proved by such evidence, a foundation ought to be laid by showing an exercise of the right, or acts of enjoyment within the period of living memory; it is the exercise of the right, that lets in the evidence of reputation. (5) Where, indeed, the subject-matter does not admit of acts of enjoyment or the exercise of a right, there the opinion of the place is of itself admissible in evidence. Thus reputation, unaccompanied by acts, is evidence of parochiality.

These declarations of deceased persons as to boundaries or customs, &c. ought to come from persons who had no interest to misrepresent; if they appear to have had any interest to

(1) Nichols v. Parker, 14 East, 331. n. 1 Maule & Selw. 81.

(2) Denn v. Spray, 1 T. R. 466. Beebee v. Parker, 5 T. R. 26. 31. Chapman v. Smith, 3 Gwill. 854. 2 Ves. 512. S. C. Doe d. Allason v. Sisson. 12 East, 62. Morewood v. Wood, 14 East, 327. n. Nichols v. Parker, ib. 331. n. And see Weeks v. Sparke, 1 Maule & Sel. 679. 684. 686. Harwood v. Sims, 1 Wightw. 112. Freeman v. Phillipps, supra, p. 251.

(3) 1 Maul. & Sel. 687. 689. and see infra, p. 268.

(4) See post, p. 263.

(5) 1 Maul. & Sel. 689. 690. 12 East, 65. 14 East, 330.

make evidence for themselves or for others, what they said cannot be received. Any declarations made *post litem motam*, that is, after the very same point or question has become the subject of controversy, are not admissible. (1) But, unless there should appear to be a controversy as to the same point, it will not be enough, for the purpose of excluding the declarations of deceased persons, to shew that they claimed under the same custom. This kind of evidence has been received on a question of parochial modus, though the deceased was a parishioner, and liable to pay tithe (2); so also on a question of parochial or manorial boundary, although the persons, who had been heard to speak of the boundary, were parishioners, and claimed rights of common on the very wastes, which their declarations had a tendency to enlarge. (3)

Tradition of particular fact.

Although on a question of boundary or custom, the general opinion of the place is evidence of the general right, yet the tradition of a particular fact, (as, that turf was dug, or such a post put down in a particular spot, &c.) said to have been done in the exercise of that right, will not be evidence (4); for the fact, which is the subject of tradition, may have been done under a licence from the very persons against whom, or against whose privies, &c. the right is afterwards claimed; and, in general, single facts are so frequently misrepresented or misreported either from intention or from ignorance, and the various circumstances which have accompanied a fact, and which may be essentially characteristic, are often so little known, or, if known, are so likely to pass unobserved and to be forgotten in the course of time, that no credit can safely be given to such a tradition. Thus, on a question of parochial modus, evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible; but if the witness says, he has heard from old inhabitants, that so much per acre was always paid in lieu of the tithes, that

(1) See supra, p. 246. 247. on this subject.

(2) Harwood v. Sims, 1 Wightw. 112.

(3) Nicholls v. Parker, 14 East, 331.; tried before Le Blanc J. 1805.

(4) 5 T. R. 709. 5 T. R. 123. 14 East, 330, 331. 1 Maul. & Sel. 687. Chatfield v. Fryer, 1 Price, 253.

will be good evidence; for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation. (1) And, in questions of pedigree, as the reputation must proceed on particular facts, such as marriages, births, and the like, the hearsay of the family respecting these particular facts, from the necessity of the case, is not excluded. (2)

Rector's and Vicar's books.

Entries made by a deceased rector or vicar, of the receipt of ecclesiastical dues, have been in several cases admitted as evidence for his successor (3); because, it is said, he had no interest to mistate the fact, in making an entry which could not possibly be evidence for himself. (4) "This," as Lord Hardwicke once said (5), "is going a great way, but has been allowed, because the parson knows, that his entry cannot benefit either himself or his representative, who has nothing to do with the living; and it is not to be presumed (he added) that the parson would make false entries for his successor, who stands indifferent to him."* The cases have even gone still further: and similar entries, made by deceased impropriate rectors, have been received as evidence for their successors,

(1) Harwood v. Sims, 1 Wightw. 112. Adams v. Evans, 4 Price, 20.

(2) 4 Campb. 416.

(3) Legross v. Lovemoor, 2 Gwill. 529. Lord Arundel's case, 2 Gwill. 620. Perigal v. Nicholson, Wightw. 63. Armstrong v. Hewitt, 4 Price, 218. In this last case, the vicar's book was produced from the parish-chest; and it was said, that there were two other legitimate depositaries for such books, besides this of the parish-chest, namely, the bishop's registry, and the registry of the archdeacon of the diocese.

(4) 7 East, 290. 1 Wightwick, 63.

(5) 2 Ves. 43.

* Such evidence is said to have been refused in Le Gross v. Lovemoor, 2 Gwill. 527.; has been mentioned as a singular exception by Ld. Kenyon in Outram v. Morewood, 5 T. R. 123.; was disapproved of by Mr. Baron Wood in Perigal v. Nicholson, 1 Wightw. Rep. 63., and in Bullen v. Michel, 2 Price, 436, also by Price B. in Woodnoth v. Ld. Cobham, 2 Gwill. 653. King C. J., in a case before him in 1719, said, this evidence had been received *per cursum Scaccarii*, though he could not give a reason for it; Vin. Ab. Ev. (T. b. 73.) See ante p. 243. as to the general objections to which hearsay evidence is liable; and Outram v. Morewood, infra p. 262.

although objected to as coming from the owners of the inheritance. (1) So, in a case where a question arose between an impropriate rector and a vicar respecting agistment tithe, the Court of Exchequer held, that the books of a deceased lessee of the rectory, stating the receipt of such tithe, were evidence, after the determination of their lease, for the impropriator (2); and, on the other hand, entries by the steward of a former deceased owner of the estate, containing an account of payments to the vicar in lieu of the tithes of particular lands, have been admitted as evidence for a succeeding owner against the impropriator. (3) In the late case of Perigal v. Nicholson and others (4), on a bill for tithes filed by the vicar against the defendants, who insisted upon a modus for hay and agistment, the Court of Exchequer admitted, as evidence for the plaintiff, an entry in the parish register, stating, that various moduses were due from the different townships of the parish for hay only, in which entry the sum total of all the moduses was in the hand-writing of a preceding vicar, but it did not appear by whom the other part of the entry had been made. The majority of the Court held, as the report states, that the entry was admissible, upon the ground that the vicar had no interest beyond his incumbency, and there did not appear to be any dispute at the time, or previously, respecting these tithes; and this entry, by admitting a modus in one article, was in abridgment of the rights of the vicar, and it was the application only which now accidentally became favourable to his successor.

It is essential in such cases, that the rector or vicar, whose books are offered in evidence, should appear to be dead; if not dead, he must be called to prove the receipt of the sum specified. There have, indeed, been cases, where, from the circumstance of finding the books of a former vicar in the possession of a succeeding vicar so far back as between the

(1) Anon. case, Bunb. 46. Anon. case, before King C. J. Vin. Ab. Ev. T. b. 73., and T. b. 117. art. 3. Illingworth v. Leigh, 4 Gwill. 1618. Woodnoth v. Ld. Cobham, 2 Gwill, 653.; Bunb. 180. S. C.

(2) Illingworth v. Leigh, 4 Gwill. 1618.

(3) Woodnoth v. Lord Cobham, 2 Gwill. 653.

(4) Wightw. 63.; Wood B. dissenting.

times of Charles the Second and George the Second, the death of the vicar might be reasonably presumed. The case of Jones v. Waller, is an instance(1), in which the book of a collector of tithes in 1679 was admitted as evidence in 1753, because it was not reasonable to suppose that the collector was then alive. In the late case of Manby v. Curtis (2), on the other hand, where the receipt purported to have been given in the year 1762, the Court of Exchequer determined, that the death of the person, in whose name the receipt was signed, could not be presumed after a lapse of fifty years, and as this fact had not been proved, that the document ought not to be received in evidence.

The cases in which a deceased rector's books have been received as evidence, in favour of a succeeding rector against a stranger, appear to be very distinguishable from the cases before cited, in which the declarations or written entries were made by deceased persons, peculiarly if not exclusively acquainted with the fact. The utmost to be said of these is, that the declarations generally related to old facts, and were made by persons who could not have used them in their own favour; and the same may be said of a great variety of cases, in which the declarations of deceased persons have been uniformly rejected. The objection against hearsay (under which title such entries must be classed, for with respect to their admissibility it is not material, whether the declarations were written or merely spoken,) is, not that the person, who asserted the fact, might have been interested to misrepresent it, but that the assertion was made not under the sanction of an oath, and that the party against whom the evidence is offered, had no opportunity of questioning the person as to the supposed fact. Here, the declarations were not against the interest of the person who made them, and were produced against a stranger; and further, the rights sought to be established by such declarations, were in their nature capable of various other kinds of proof.

(1) 3 Gwill. 847.

(2) Price, 225. 229. 235. Mr. Baron Wood dissenting.

Old leases and old rent-rolls have, in certain cases, been received in evidence, in favour of a party claiming under the lessors. (1) On a question, whether certain lands, which had been approved from a waste, were subject to a right of common, several counterparts of old leases kept among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from any such charge, were allowed to be evidence for the plaintiff, who claimed under the lord of the manor, against the defendant in trespass, who justified for common of pasture; they were admissible in evidence to prove this fact, that, at the time of their respective dates, the lord of the manor granted the land free from common; and though possession under the leases was not shewn, yet that was not an objection against the admission of the evidence in this case, as the leases were so old that no person could speak to possession under them. (2) So, where the question was, whether the plaintiffs were entitled to a prescriptive right of exclusive fishery in a navigable river, which they claimed under the lords of the manor, they were allowed to give in evidence old entries of licences on the court-rolls of the manor, stating that the lords of the manor had the several fishery, and had granted the liberty of fishing for certain rents: nor was it thought necessary to prove payment under these licences, as they were of such an ancient date, that evidence of payment could not reasonably be expected. (3) The old licences were, therefore, admitted; but it was added, that they would not be entitled to any weight, unless payment under similar licences could be proved in later times, or that the lords of the manor had exercised other acts of ownership, which had been acquiesced in.

Counterparts of leases—Entries in rent-rolls.

In the former of the two last-mentioned cases, the evidence consisted of counterparts of ancient leases, from which it appeared that the demised lands were, at a certain time, not subject to common. In the latter case, the entries,

(1) Newburgh v. Newburgh, Vin. Ab. "Evidence," T. b. 43. 3 Brown. Parl. Cases, 553. By Heath J. in 1 Campb. 309.

(2) Clarkson v. Woodhouse, 5 T. R. 412. (a)

(3) Rogers and others v. Allen, 1 Campb. 309., before Heath J.

offered in evidence, were entries on the court-rolls of the manor, to which the tenants of the manor would have access. But entries by a deceased person, of the receipt of rent for particular lands, would not be evidence for a party claiming under the deceased, to shew that the lands belonged to his ancestor. Thus in the case of Outram v. Morewood (1), (where one of the points to be established was, whether certain lands, described in ancient title deeds, were the same, for which certain rents had been at several times paid,) the Court of King's Bench determined, that entries made by a deceased person, under whom the defendant claimed, acknowledging the receipt of rent for the premises in question, were not admissible evidence for the defendant. Lord Kenyon on that occasion said, " This is distinguishable from all the cases cited. In those, something was produced in respect of the interest of the party; and what the party did or said may be evidence against himself. But here, the entry was a mere private memorandum, to remind the person that he had received the rent, and cannot be admitted to decide the right between these parties. Evidence of this kind can only be admitted to restrain, not to advance, the interest of the party who makes it. What a man does in his closet ought not to affect the rights of third persons. There is only one instance in which this is allowed, namely, the books of an incumbent respecting his tithes. But that has been always considered an excepted case." "The general rule," said Lord Hardwicke (2), in the case of Glyn v. The Bank of England, " is, that a man cannot make evidence for himself. What he writes or says for himself cannot be evidence of his right, and consequently cannot be for his representative claiming in his right and place. I will not say, (added Lord Hardwicke,) how length of time may vary it; but otherwise it cannot be, any more than for himself."

Survey of manor

A survey of a manor or estate, made by the owner, is not evidence against a stranger, in favour of a succeeding owner,

(1) 5 T. R. 123. And see Lord Pomfret v. Smith, 7 Brown, P. C. 5 T. R. 413. n.

(2) 2 Ves. 43. R. v. Debenham, 2 Barn. Ald. 186.

that particular lands are parcel of the estate. (1) But a survey, which was delivered by the owner to a purchaser of part of his estate, would be evidence against such former owner and against a purchaser of the other part; as in the case of Bridgman v. Jennings (2), where Lord Holt ruled, that, if A. be seised of the manors of B. and C., and during his seisin of both he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence: but it would be otherwise, said Lord Holt, if the two manors had not been in the hands of the same person at the time when the survey was taken. A survey, then, which has been made by a former owner of the estate, is not evidence of the locality or identity of land against any person, who was a mere stranger to the survey.

In questions concerning public rights, common reputation is admitted to be evidence; for such rights, being matters of public notoriety and of great local importance, become a continual subject of discussion in those parts of the country, where all have the same means of information and the same interest to ascertain the claim. (3) Thus, for example, if a question should be raised, whether a corporation has a prescriptive right to collect tolls on a public navigation, it would be good evidence to shew, that deceased persons have been heard to acknowledge the right, and to declare that they had been so informed by their predecessors. The same reason applies, in a less degree, to questions respecting general customs, which concern parishes, or manors, or the inhabitants of towns and other places. (4) In such cases, general reputation is some evidence of a right beyond the memory of living witnesses, and thus tends to support the modern usage. Hearsay as to public rights.

(1) Anon. 1 Str. 95.
(2) 1 Ld. Raym. 734. Gilb. Ev. 70. And see Davies v. Pierce, 2 T. R. 53. Allott v. Wilkinson, 1 Gwill. 1585.
(3) Morewood v. Wood, 14 East, 329. See Weeks v. Sparke, 1 Maul. & Sel. 679. 685. Supra, p. 256.
(4) 14 East, 327. Supra, p. 256.

Hearsay as to private rights.

With respect to the admissibility of common reputation, as evidence of prescriptive rights strictly private, there has been considerable doubt. In one of the latest cases on this subject (1), where, on a motion for a new trial, the question was, whether such evidence ought to have been received, as evidence of a prescriptive right of digging stones on a waste, the Court of King's Bench was equally divided. A book of authority lays it down broadly, that "in questions of prescription it is allowable to give hearsay evidence, in order to prove general reputation: and that therefore, where the issue was on a right of way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was acknowledged." (2) But, on the other side, there are many great authorities against receiving this kind of evidence. (3) And there appears to be good reason for the distinction. For where individuals claim merely a private right, other people have not the same means of knowing it, nor, if they had, would they have the same interest to examine it. How, for instance, can the common belief among the inhabitants of a parish supply any kind of information, on a question of right of way claimed by an individual over a particular field? (4) In such cases, common reputation appears to give no satisfactory information, and to be inapplicable to the point in issue. In the case of Weeks v. Sparke (5), one of the latest cases on this subject, which was an action for a trespass on the plaintiff's close, parcel of a common, &c. the defendant justified for a prescriptive right of common at all times over the place, &c. and the plaintiff in his replication prescribed to use the place

(1) Morewood v. Wood, 14 East, 327. Ld. Kenyon C. J. and Ashurst J. against the evidence; Buller J. and Grose J. for it.

(2) Bull N. P. 295. And see the opinions of Buller J. and Grose J. in Morewood v. Wood, 14 East, 330. n. 3 T. R. 709. In Webb v. Petts, Noy, 44., it is said, the Court agreed that proof by hearsay, of a modus for a particular farm, was admissible. See also Price v. Littlewood, 3 Campb. 288. stated infra.

(3) Lord Kenyon in Reed v. Jackson, 1 East, 357. Lord Kenyon and Ashurst J. in Morewood v. Wood, 14 East, 329. Lord Kenyon in Withnell v. Gartham, 1 Esp. N. P. C. 324. See also Clothier v. Chapman, 14 East, 331. n. Didsbury v. Thomas, 14 East, 323. Barnes v. Mawson, 1 Maul. & Sel. 81. Blacket v. Lowes, 2 Maul. & Sel. 494.

(4) See 1 Maul. & Sel. 691.

(5) 1 Maul. & Sel. 679. See City of London v. Clerke, Carth. 181.

for tillage, &c. qualifying the defendant's general right; to support this prescriptive right of tillage, the plaintiff offered evidence of reputation, which was received at the trial; and the Court of King's Bench were of opinion, that it had been properly admitted, on the ground, that the right claimed by the plaintiff, although claimed by prescription, yet was an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district.

It has been said, indeed, that in the case of the Bishop of Meath v. Lord Belfield (1) in a quare impedit, after the plaintiff had given in evidence an entry, in the register of the diocese, of the institution of one K., (in which entry there was a blank, where the patron's name is usually inserted,) parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one, under whom Lord Belfield claimed; and that upon a bill of exceptions, this evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and what commences by parol may be transmitted to posterity by parol, and that this creates a general reputation. But Lord Kenyon adverting to this case in the case of the King v. Eriswell (2), said, he admitted that a presentation might be by parol, and might be proved by parol, that is, by a witness who was present and heard it: but he denied, that in such a case common reputation could be given in evidence. If it can, he added, why might not such evidence decide titles to estates, at least before the statute of frauds, when no written instrument was required, to make a good feoffment of the greatest landed property in the kingdom.

The declarations of deceased persons have also been admitted, in cases where they appear to be made against their interest; as, entries in their books, charging themselves with the receipt of money on the account of a third person (3),

Declarations against interest.

(1) Bull. N. P. 295. and cited by Buller J. in R. v. Eriswell, 3 T. R. 719. S. C. reported 1 Wils. 215.

(2) 3 T. R. 723. Tellard v. Shebbeare, 2 Wils. 366.

(3) Barry v. Bebbington, 4 T. R. 515. Harpur v. Brooke, 3 Woodeson, Lect. 332. Stead v. Heaton, 4 T. R. 669.

or acknowledging the payment of money due to themselves. (1) In either case, the entry is to their own immediate prejudice, and strong evidence of the fact, in consideration of which the money is said to have been received or paid. Thus, where the point in issue was, whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste, are evidence to shew that the right to the soil was in his master, under whom the plaintiff claimed. (2) So rentals, in which a deceased bailiff or receiver charges himself with specified sums, are evidence to shew for what particular tenure, or in what right the money was received. (3) So, a bill of lading, signed by the deceased master of a vessel, for goods to be delivered to a consignee, is evidence of property in the consignee, not only against the master, but also, as it seems, in an action of trover for the goods against a third person. (4) So, a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger, in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (5) This entry was made by a person, who, so far from having an interest to make it, had an interest the other way: for it appeared distinctly from other evidence, that the work charged was actually done; and the discharge in the book repels the claim, which he would otherwise have had.

Upon the same principle, in a late case, in an action of ejectment by the first tenant in tail under a settlement (by which an estate was limited to A. for life, remainder to B. for

(1) Warren v. Grenville, 2 Str. 1129. commented on by Lord Mansfield in Brydges v. Duchess of Chandos, 2 Burr. 1072. and by Lord Ellenborough in Higham v. Ridgway, 10 East, 118. Doe dem. Reece and others v. Robson and another, 15 East, 33.

(2) Barry v. Bebbington, 4 T. R. 515.

(3) Harpur v. Brooke, 3 Woodeson's Lect. 332. Vin. Ab. "Evidence," (A. b. 15.) 13.

(4) Haddow v. Parry, 3 Taunt. 305.

(5) Higham v. Ridgway, 10 East, 109, 110.

life, remainder to C. his eldest son for life, remainder to C.'s eldest son in tail, &c. with a power to the tenants for life to grant leases on condition of reserving the ancient rent,) against the defendant who claimed as lessee of C., to recover a part of the estate, which, as the lessor of the plaintiff complained, had been demised for less than the ancient rent, the Court of King's Bench held, that a letter addressed to B., by one intimately acquainted with the property, purporting to be a particular account of the ancient rents at that time, and recognized as such by B., and preserved by the successive owners of the estate, ought to have been received at the trial, as evidence of the ancient reserved rent against C., (a succeeding tenant for life, subject to the restrictions of the same power,) and also against the defendant claiming under C. This old paper, so accredited and adopted, was considered to be equivalent to a declaration by B. himself. Lord Ellenborough, in delivering the judgment of the Court, said, "The contents of the paper were adverse to the title of the person who had possession of it, by diminishing the interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. Then at such a distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury." (1)

And where the question was, whether some horses, which had been taken by the defendant under a heriot custom, belonged to the plaintiff or to one A. B., a deceased tenant of the defendant, declarations by A. B. were offered in evidence for the purpose of proving that the horses belonged to the plaintiff before A. B.'s death, in which declarations A. B.

(1) Roe d. Brune v. Rawlings, 7 East, 279. 290. See also the following cases, in which declarations of deceased persons, against their interest, were received in evidence; Baggalley v. Jones, 1 Campb. 367.; Morewood v. Wood, 14 East, 328.; Doe d. Reece v. Robson, 15 East, 33.; Price v. Littlewood, 3 Campb. 288, stated infra. And see Lady Dartmouth v. Roberts, 16 East, 334.; Hodgson v. Fullarton, 4 Taunt. 787.; Wadley v. Bailiss, 5 Taunt. 752.; Searle v Lord Barrington, supra, p. 157.

stated that he had given up his farm and all his stock to the plaintiff. This evidence was rejected at the trial; but the Court of Common Pleas, on a motion for a new trial, held that the declarations ought to have been admitted, since they were against the interest of the person who made them, and might have been given in evidence against him in his life-time, if the plaintiff had brought an action for the horses. (1)

Upon the same principle, a paper signed by many deceased copyholders of a manor, importing what was the general right of common in each copyholder, and agreeing to restrict it, is evidence of reputation even against other copyholders not claiming under those who signed it. (2) So, a declaration by the owner or occupier of adjoining land, that his neighbour's land extends to such a spot, accompanying an act of forbearance to go beyond the spot for that reason, (or without such act, if he speaks against his interest,) is evidence that the land extends so far. (3) So, the declaration of a deceased occupier of land, that he rented it under a certain person, is evidence of that person's seisin. (4) Such admissions or declarations against interest appear to be evidence upon the same principle, as the acts of a party against his interest; they differ in degree and in their effect, rather than in their nature. An act of forbearance on one side is an admission of right on the other; and proof of the exercise of a right, which has been acquiesced in, is still stronger evidence that the right exists. It is the constant practice to receive such evidence on questions concerning tolls, rights of way, freehold in wastes, and other cases of the same kind. (5)

The memorandum or entry, before it can be received in evidence, must be proved to be authentic; as, by shewing it

(1) Ivat v. Finch, 1 Taunt. Rep. 141

(2) Chapman v. Cowlan, 13 East, 10.

(3) Sir T. Stanley v. White, 14 East, 332, 339, 341.

(4) Uncle v. Watson, 4 Taunt. 16. Doe dem. Baggalley v. Jones, 1 Campb. 367.

(5) 1 Str. 659. 14 East, 342. 1 Campb. 310. 5 Taunt. 752.

to be the hand-writing of the deceased person, who knew the fact there stated, or that it was signed by him (1): or, if signed by another, that it was made by his order, or afterwards acknowledged by him. And as to the question, whether a book produced was a receiver's book, that may be determined by internal evidence on an inspection by the Court. (2)

In all the cases which have been mentioned on this subject, the person, who made the entry or declaration in question, was deceased at the time of the trial: if the rule were not confined to such cases, there would be great danger of collusion. It has, therefore, been held, that such evidence is not admissible, where the person is incapable of attending from illness. (3) This is the rule respecting the proof of modern entries in private books. But entries in the public books of public companies are admitted, without the proof of the officer who made them. (4)

Tradesman's Book.

Entries in the books of a tradesman by his deceased shopman, who therein supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of goods, or of other matter there stated within his own knowledge. Thus, in an action of assumpsit, the usual course of the plaintiff's dealings appeared to be, that the draymen of the plaintiff, who was a brewer, should come every night to the clerk of the brewhouse, and give him an account of the beer delivered out by them, which he set down in a book kept for the purpose, and the draymen signed it; the drayman, who signed the particular entry offered in evidence, had since died, but his hand-writing was proved; and

(1) 4 T. R. 515, 516. Jones v. Waller, 3 Gwill. 847. Yate v. Leigh, 3 Gwill. 861.

(2) Doe d. Webber v. Lord G. Thynne, 10 East, 206. 4 T. R. 516.

(3) Harrison v. Blades, 3 Campb. 457. Manby v. Curtis, 1 Price 282. 235. Cooper v. Marsden, 1 Esp. N. P. C. 2. stated infra, p. 271.

(4) Hodgson v. Fullarton, 4 Taunt. 787. by Mansfield Ch. J. The officer was prevented from attending, by illness. This point was not suggested afterwards, among the grounds for entering a nonsuit.

this entry was held to be good evidence of the delivery of the beer, for which the action was brought. (1)

This declaration of the tradesman's servant, of having delivered the goods, is an implied admission, that he received them for that purpose, and would have been evidence against him, in an action for not delivering them according to his instructions. But it is clearly distinguishable from entries in the book of a receiver, who by making a gratuitous charge against himself, knowingly against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him to suppress altogether the fact of his having received any thing, or to misrepresent the amount of the sum, but not to mis-state the ground or consideration for which it was received; that is, not to mis-state the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is offered in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said in every case of hearsay. The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say: to have said nothing at all, would, as he must have known, necessarily lead to some inquiry. These considerations may serve to shew, how cautiously such declarations by shopmen are to be admitted in evidence, to charge third persons with the receipt of goods; more particularly, as the tradesman may easily be furnished with evidence of delivery, by taking a memorandum from the purchaser, or by requiring some other security.

(1) Price v. Ld. Torrington, 1 Salk. 285.; 2 Ld. Raym. 873. S. C. See Pitman v. Madox, 2 Salk. 690.; Calvert v. Archbishop of Canterbury, 2 Esp. N. P. C. 645. The entry of a copy of a licence, in a merchant's letter-book, written by a deceased clerk, and proved to be in the usual course of business, admitted; Hagedorn v. Reid, 3 Campb. 379.

The entry in the tradesman's book ought to have been made by the shopman; or, if not actually written by him, should at least appear to have been observed by him soon after it was made, so as to enable him to speak to its correctness, and that the entry may be tantamount to one made by the shopman himself. (1) If the shopman is living, he ought to be produced as witness, that he may explain the circumstances and dealings on which the entry was founded. When he is examined, he may use the entry as a memorandum; and the other party, charged with the debt, will then have an opportunity of examining into its correctness. If the person, who made the entry, was employed as shopman or clerk to deliver goods, &c. and he is since dead, an entry made by him will be evidence under certain restrictions. But proof of the handwriting of the clerk, and that he is gone abroad, and is not likely to return, has been held not to be sufficient to make such an *ex-parte* memorandum admissible in evidence. (2)

In the case of Evans and Lake (3) a merchant's books were received in evidence under particular circumstances. The question there was, whether certain goods, which had been bought in the name of Mr. Lake, were purchased on his own account, or in trust for Sir Stephen Evans. To prove the latter of these positions, the assignees of Sir Stephen Evans, who were the plaintiffs, first shewed, that there was no entry in the books of Mr. Lake relating to this transaction; they then produced several receipts in the possession of Sir S. Evans for the payment of part of the goods, and on the back of the receipts there was a reference in the hand-writing of Sir Stephen's book-keeper, since deceased, to a certain shop-book of Sir Stephen. Upon this, the question was, whether the book so referred to, in which was an entry for the payment of money for the whole of the goods, should be read. And the Court of King's Bench on a trial at bar ad-

(1) Digby v. Stedman, 1 Esp. N. P. C. 327.

(2) Cooper v. Marsden 1 Esp. N. P. C. 2.

(3) Bull. N. P. 282, 283. and see Cooper v. Marsden, 1 Esp. N. P C. 1.

mitted the entry, not only as to the part mentioned in the receipts, but also as to the remainder of the goods then in the hands of Mr. Lake's son. In this case (which Lord Hardwicke has observed upon, as "new and having gone a great way (1),") the entry was not offered by the assignees as evidence of payment against the seller of the goods, but as corroborating evidence to shew, that while the books of the other party concerned took no notice whatever of the goods, those of Sir S. Evans, under whom the plaintiffs claimed, treated the goods as bought on his account.

In another case, where the plaintiff, to prove delivery of wine to the defendant, produced a book belonging to his cooper, since dead, whose name was subscribed to several articles, which it was proposed to read after proof of the hand-writing, Lord Raymond C. J. would not allow it, saying it differed from Lord Torrington's case. (2) And Lord Kenyon ruled, in the case of Calvert v. Archbishop of Canterbury (3), that in an action for the hire of a pair of horses an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, ought not to be admitted.

In an action by a tavern-keeper (4), it appeared, that the defendant belonged to a club, which was held at the plaintiff's house, and that in a room, where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club, who had thereby an opportunity of inspecting and correcting the account. Lord Kenyon admitted the book as evidence of the delivery, though it was not proved that the servants, who made the entry, were dead, nor was their absence accounted for, and only their hand-writing was proved. The daily account in the book was in this case considered

(1) Glyn v. Bank of England, 2 Ves. 43.

(2) Clerk v. Bedford, Bull, N. P. 282. See Cooper v. Marsden, 1 Esp. N. P. C. 1.

(3) 2 Esp. N. P. C. 646.

(4) Wiltzie v. Adamson, K. B. Sitt. after Mich. term 1789. MS.

as tantamount to a bill delivered and admitted by the defendant.

The stat. 7. J. 1. c. 12. enacts, that the shop-book of a tradesman shall not be evidence, in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for the said debt, or shall have brought against him some action, within a year next after the delivery of the wares, or the work done. (1) And the 2d section provides, that nothing in the act shall extend to the mutual trading and merchandize between tradesman and tradesman. At the time of making this act of parliament, there was an opinion growing up, that, after a certain length of time, a man's shop-books would be evidence for him, after the year: to prevent which the act was made. (2) However, the book is not evidence, even within the year, except under particular circumstances. An entry made by a tradesman himself, stating the delivery of goods, is not evidence for him; but, whether made by him or not, it may often serve as a memorandum to refresh the memory of the shopman, and for that purpose is admissible. An entry by a tradesman, stating a debt due from himself to a third person, is manifestly good evidence of the debt, as a statement against his interest; thus, entries by a bankrupt, and an account signed by him before his bankruptcy, charging himself with a balance, are admissible as evidence of the petitioning creditor's debt in an action by the assignees. (3) It is essentially necessary, in such cases, to prove the signing of the account, or the making of the entry, before the act of bankruptcy, and to prove this by extrinsic evidence.

It has been already stated, that admissions by one of the parties to a suit, against his interest, are evidence against him; and that statements made by a third person, on being referred

(1) Sikes v. Marshall, 2 Esp. N. P. C. 705.
(2) By Ld. Hardwicke, 2 Ves. 43.
(3) Watts v. Thorpe, 1 Campb. 376. Hoare v. Coryton, 4 Taunt. 560.

to by a party respecting any litigated point (1), or representations by a party's agent (2), are in many cases admissible against the principal. To such cases the objection of hearsay does not apply. Nor does the objection apply to the account which has been given by a witness on a former trial, or to dying declarations.

Testimony on former trial.

If a witness, who has been examined in a former action between the same parties, and where the point in issue was the same as in the second action, is since dead, what he swore at the trial may be proved by one who heard him give evidence (3); for such evidence was not given in an extrajudicial manner, but upon oath: the parties to the suit were the same, the point in issue was the same, and an opportunity was given for cross-examination. These circumstances plainly distinguish the proposed evidence from hearsay. So, where a person, who had been sworn on a former trial between the same parties on the same issue, and subpœna'd to appear as witness at a second trial, did not appear in obedience to the writ, the Court of King's Bench, seeing reason to believe that he had been kept away by the contrivance of the adverse party, admitted other witnesses to prove what he had sworn on the former occasion. (4)

The person called to prove what a deceased witness said, must undertake to repeat precisely his very words, and not merely to swear to their effect. (5) Thus, in a case before Lord Kenyon, a witness was not allowed to speak to the effect of what the deceased witness had sworn on the former trial. "He ought," said Lord Kenyon, "to recollect the very words; for the jury alone can judge of the effect of words." (6) And

(1) See ante, p. 102.

(2) See ante, p. 100.

(3) R. v. Carpenter, 2 Show. 47. Buckworth's case, Sir T. Raym. 170. Vin. Ab. "Evidence," (T. b. 88.), pl. 8. Coker v. Farewell, 2 P. Wms. 563. Pike v. Crouch, 1 Ld. Raym. 730. By Lord Kenyon, 4 T. R. 290. Mayor of Doncaster v. Day, 3 Taunt. 262.

(4) Green v. Gatark, Bull. N. P. 243.

(5) Lord Palmerston's case, cited by Lord Kenyon in R. v. Jolliffe, 4 T. R. 290.

(6) Ennis v. Donisthorne, Cornw. Sum. Ass. 1789, MS.

he cited the case of the King v. Deborah from one of his own notes, to the same point. For the purpose of introducing an account of what a deceased witness swore on the first trial, the nisi prius record and the postea indorsed are good evidence to shew, that a cause was brought on for trial, or that it actually tried. (1)

Dying declarations.

The dying declarations of a person, who has received a mortal injury, that is, declarations made under the apprehension of death, are constantly admitted in criminal prosecutions; and are not liable to the common objection against hearsay evidence. (2) The principle of this exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on a supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery. This consciousness of approaching death is to be collected either from the circumstances of the case, (as, from the nature of the wound and the state of body,) or from expressions used by the deceased. (3) And it has been decided by all the Judges, that the question, whether the deceased made the declarations under the apprehension of death, is a question for the Judge, not for the jury to determine, previous to their admission. (4)

Dying declarations have been admitted in evidence, although it appeared that the deceased made a subsequent statement,

(1) Pitton v. Walter, 1 Str. 162.

(2) R. v. Reason and Tranter, 1 Str. 499. 6 St Tr. 202—205. S.C. Woodcock's case, 2 Leach, Cr.C. 566. Bambridge's case, 9 St. Tr. 161.

(3) Woodcock's case, 2 Leach, Cr. C. 566. Dingler's case, ib. 638. John's case, 1 East, Pl. Cr. 357.

(4) By the opinion of all the Judges, in John's case, 1 East, Pl. Cr. 358., and in Welborne's case, 1 East, Pl.Cr. 359. In Woodcock's case, which was before the two last, this question had been left to the jury by Eyre C. B., 1 East, Pl.Cr. 360. Still, however, it is the practice with many learned Judges to direct the jury, that, if they believe the declarations were not made under the apprehension of death, they ought to reject them from their consideration.

which had beed taken in writing before a magistrate, but the written examination was not ready to be produced at the trial. This subject was much discussed on the trial of Reason and Tranter under the following circumstances (1): — The deceased stated the particulars of the injury, which occasioned his death, at three several times in the course of the same day, with an interval of about an hour between each: the first and last account had not been written; the second was reduced into writing, in the presence of a magistrate, by the same person to whom the former account had been given; this written statement was retained by the magistrate, and as he had removed to a distant part of the country, and it was not known to what place, the original was not produced, and an examined copy was rejected. An argument then ensued with respect to the admissibility of the first statement of the deceased. The Chief Justice (Sir John Pratt) was of opinion, that evidence of the first and third statement ought not to be received, considering all three as statements to the same effect, and forming one entire narrative, of which the written examination was the best proof. But the other Judges (2) were of a different opinion; they held, that the three accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first and third declaration, because the prosecutor was disabled from giving an account of the second. The witness was therefore directed to repeat his evidence, laying the examination before the Justices out of the case; and the first as well as the third statement was admitted.

The dying declarations of an accomplice have been held to be admissible; for the accomplice himself would have been a competent witness, if he had been living. This was determined by all the Judges in Margaret Tinkler's case. (3) The greater part of the Judges were of opinion in this case,

(1) 6 St. Tr. 202—205. 1 Stra. 499. S. C.

(2) 1 Stra. 500. The reporter was one of the counsel for the prosecution. From the report in the State Trials it would appear, that the Chief Justice and Mr. Justice Powis were against receiving the evidence; Mr. Justice Eyre and Mr. Justice Fortescue were for receiving it. The evidence, however, according to that report, was at last received.

(3) 1 East, Pl. Cr. 354. 356.

that the declarations of the deceased were alone sufficient evidence to convict the prisoner; on the ground, that they were not to be considered as evidence coming from a particeps criminis, as she thought herself dying at the time, and had no view or interest to serve in excusing herself, or fixing the charge unjustly on others. But others of the Judges held, that her declarations were to be so considered, and therefore required the aid of confirmatory evidence. The declarations of a criminal at the time of his execution cannot be received on the trial of an accomplice; for after attainder he could not be sworn as a witness. (1)

The same kind of evidence is admissible in civil cases, as well as in trials for murder. Thus, the declaration of a person, who, having set his name as subscribing witness to a bond, in his dying moments begged pardon of Heaven for having been concerned in forging the bond, was admitted as evidence of the forgery by Mr. Justice Heath (2), on the authority of Wright on the demise of Clymer v. Littler (3), where similar evidence of a dying confession, by a subscribing witness to a will, had been received by Chief Justice Willes, and afterwards approved by the Court of King's Bench. Lord Mansfield on that occasion said, "The account was a confession of great iniquity, and as the dying person could be under no temptation to say it, but to do justice and ease his conscience, I am of opinion the evidence was proper to be left to the jury."

As the declarations of a dying man are admitted, on a supposition that, in his awful situation on the confines of a future world, he had no motives to misrepresent, but on the contrary the strongest motives to speak without disguise and without malice, it necessarily follows, that the party, against whom they are produced in evidence, may enter into the particulars of his state of mind and of his behaviour in his last moments;

(1) Drummond's case, 1 Leach, Cr. C. 378; 1 East, Pl. Cr. 353. S. C.

(2) Cited by Lord Ellenborough in Aveson v. Lord Kinnaird, 6 East, 195.

(3) 3 Burr. 1244. 1255. 1 Blac. Rep. 346. S. C.

or may be allowed to shew, that the deceased was not of such a character, as was likely to be impressed by a religious sense of his approaching dissolution.

Hearsay, part of the transaction.

Hearsay is often admitted in evidence, as part of the transaction, which becomes the subject of inquiry; the meaning of which seems to be, that where it is necessary in the course of a cause to inquire into the nature of a particular act or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, for the purpose of shewing its true character. Thus, for example, in an action by the assignees of a bankrupt, the declarations of the trader at the time of his absenting himself from home, or immediately subsequent, are properly received in evidence, to shew the motive of his absence: for it is the intent with which he departed from his dwelling-house, that constitutes the act of bankruptcy. (1) His order to a servant, to deny him to a creditor, is evidence, and for the same reason, as shewing his intention at the time of the refusal. In the case of Bateman v. Bailey (2), the Court of King's Bench were of opinion, that the reasons, which the party gave for his absence, after his return home on the following day, ought to have been admitted in explanation of his own act. The conversation of a person on his return home, as it has been justly observed (3), naturally connects itself with the occasion of his absence, and is an indication of the existing state of his mind; and whenever the expressions can be so connected with the actions, as to be regarded as the mere result and consequence of the co-existing motives, they form a proper criterion for judging of the person's intention and conduct. But it would be too much to infer generally from this decision, that the declarations of a bankrupt, made at any time afterwards, can be admitted as evidence to explain an antecedent absence or any other past transaction, which is completely finished. Such

(1) Ambrose v. Clindon, Rep. temp. Hard. 267. Marsh v. Meager, 1 Starkie, 353.

(2) 5 T. R. 512. Maylin v. Eyloe, 2 Str. 80. Ewens v. Gold, Bull. N. P. 40.

(3) See Evans's edit. of Pothier, 2d vol. 285.

statements, concerning past transactions, are in general not admissible. (1)

For the same reason, letters written by the payee of a promissory note to the maker, contemporaneous with the making of the note, and forming a part of the original transaction, are admissible in evidence, to prove the consideration passing between the parties; and this also, in an action by the indorsee against the maker. (2) It cannot be more necessary to call the party who wrote, than in the case of a verbal agreement to call the party who spoke the words. A written agreement is proved by the writing, as a verbal agreement may be proved by a witness who heard the parties agree.

In the case of Thompson and wife against Trevanion (3), which was an action of trespass and assault, Lord C. J. Holt allowed what the wife said immediately on receiving the hurt, and before she had time to devise or contrive any thing for her own advantage, to be given in evidence. So, on an indictment for a rape, what the girl said so recently after the fact as to exclude a possibility of practising on her, has been held to be admissible in evidence, as a part of the transaction; her description of herself and of her state may be properly admitted; but the particulars of her complaint are not evidence as to the truth of her statement. (4) So in the case of Aveson v. Lord Kinnaird (5), (where, in order to ascertain whether the deceased was in a good state of health on the day of the insurance, it became material to consider what the state of health was both before and after that day,) the account, which the deceased gave some days after obtaining the certificate of good health, respecting her state on the former day, was admitted at the trial, and the Court of King's Bench were

(1) See the cases before cited; and Robson v. Kemp, 4 Esp. N. P. C. 233. Beresford, 2 Camp. 512. Collenridge v. Farquharson, 1 Starkie, 261. Bull. N. P. 17.

(2) Kent v. Lowen, 1 Camp. 177. 180. d. For other examples in illustration of the same rule, see R. v. Hathaway, Howell's Collection of St. Tr. vol. xiv. 654. Du Bost v.

(3) Skin. 402. cited by the Court, 6 East, 193.

(4) Brazier's case, 1 East, Pl. Cr. 444. R. v. Clarke, 2 Starkie, 241.

(5) 6 East, 188. 198.

of opinion, that it had been properly admitted. And it is in every day's experience, said Mr. Justice Lawrence in this case, that what a man has said of himself to his surgeon is evidence in an action of assault, to shew what he has suffered by reason of the assault.

It should seem also, in an action for criminal conversation, the declarations of a wife at the time of her elopement, stating the reason of her eloping, (as, that she fled from an immediate fear of personal violence,) would be evidence against the husband (1); but a collateral declaration, respecting a matter which happened at another time, would not be admissible. And where, in an action for criminal conversation, the defence was, that the plaintiff had connived at his wife's elopement, evidence was received, on the part of the plaintiff, of the wife's declarations as to her intention and purpose in going (2): for the question in effect was, whether the husband knew that she was about to elope, or whether he believed that her intention was as she represented.

What a third person has said or written is admissible, in many cases, as amounting to an act done by him, or as shewing his knowledge, or as evidence of his conduct. If, for instance, it is material to enquire, whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of the order; or where it is material to enquire, whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly shew his knowledge, as what he has done. So, where it is relevant and material to inquire into the conduct of rioters, what has been said by any of the party in the act of rioting must manifestly be admissible in evidence, as shewing their design and intentions.

(1) 6 East, 193.

(2) Hoare v. Allen, 3 Esp. N. P. C. 276. before Ld. Kenyon on 2d trial, who said, that some of the Judges, on the motion for a new trial, were of opinion, that this evidence ought to be admitted.

CHAP. VIII.

Of the Examination of Witnesses.

AFTER considering, in the last chapter, what kind of evidence ought to be produced for ascertaining the points in issue, the next subject of enquiry relates to the manner in which witnesses are to be examined.

Examination as to objection of interest.

The ordinary mode of proceeding in the courts of common law, preparatory to the examination of a witness, is to swear him in chief, unless an objection should be made to his competency; in which case, the practice formerly was to examine him on the voire dire, and this was so strictly observed, that, if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. (1) But, in later times, the rule has been to a certain extent relaxed, and now, if it should be discovered in any stage of the trial, before the close of a witness's examination and before his dismissal, that he is interested, his evidence will be rejected. This is as well for the convenience of the Court, as for the purposes of justice. The examination of a witness, to discover whether he has any interest in the cause, is frequently to the same effect as his examination in chief; it therefore saves time and is more convenient, that the witness should be sworn in chief in the first instance; and if it should afterwards appear, in the progress of the examination, that he is interested, it will then be time to take the objection. (2) This relaxation, however, of the ancient rule, does not extend so far, as to allow the counsel on the cross-examination to ask the witness every sort of question, which might be proper on the voire dire. For example, after an examination in chief, a witness is not to be cross-examined as to the contents of a will not produced in

(1) See Lord Lovat's case, 9 St. Tr. 639. 646. 704.

(2) Turner v. Pearte, 1 T. R. 717. Perigal v. Nicholson, 1 Wightw. 64. Stone v. Blackburn, 1 Esp. N. P. C. 37. Beeching v. Gower, 1 Holt, N. P. C. 313.

court, under which it is suggested that he takes some interest; although such questions might be properly asked in an examination on the voire dire. (1)

Examination in chief.

When the witness has been regularly sworn, he is first examined by the party which produces him; after which, the other party is at liberty to cross-examine. The examination is in open court, in the presence of the parties, their attornies and counsel, and before the judge and jury, who have thus an opportunity of observing the understanding, demeanor, and inclination of the witnesses. It may often be advisable to examine witnesses separately, and out of the hearing of each other, with a view to obviate the danger of a concerted story among the witnesses, and to prevent the influence which the account given by one may have upon another. *

Leading questions.

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief; for, to direct witnesses in their evidence would only serve to strengthen that bias, which they are generally too much disposed to feel, in favour of the party that calls them. Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked, whether the one defendant has interfered in the business of the other. (2) This is not a leading

(1) Howell v. Lock, 2 Camph. 14.

(2) Nicholls v. Dowding and another, 1 Starkie, 81, by Lord Ellenborough.

* By the law of Scotland, this separate examination takes place in all criminal prosecutions. The rule there is, that if a witness has been present in Court during the examination of another witness, so as to hear his evidence, he will be rejected. See Hume's Com. on Crim. Law of Scotland, 2 vol 365. Burnet's Treatise, 467.

question; for though he may have interfered, it will not follow, that he has by this alone made himself liable as partner. Or if a witness, called to prove the partnership of the plaintiffs, is not able at the moment to specify the several names of the partners, a number of names, containing those of the partners among others, may be suggested to the witness, for the assistance of his memory. (1)

If a witness, indeed, should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court will in its discretion allow the examination in chief to assume the form of a cross-examination. And in examining a witness for the purpose of directly contradicting another witness on the opposite side, as to some particular parts of his evidence, which no general examination in chief would be able to touch, leading questions have been allowed. Thus, for example, after exhausting the witness's memory as to the contents of a letter, written by the plaintiff and afterwards lost, he may be asked, whether it contained a particular passage, which has been sworn to, by a witness on the other side; otherwise it would be scarcely possible ever to come to a direct contradiction. (2)

Leading questions are admitted in the cross-examination of a witness, where much larger powers are given to counsel than in the original examination. Witnesses, upon the cross-examination, may be led immediately to the point, on which their answers are required. (3) If they betray a zeal against the cross-examining party, or shew an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. There can be no danger in leading too much, where the witness is obstinately determined not to follow. On the other hand, instances frequently occur, where the witness is adverse to the

(1) Acerro and others v. Petroni, 1 Starkie, 100. In a criminal prosecution it is proper, and the common practice is to direct the attention of the witness to the person of the prisoner, and ask him, whether that is the man, of whom he has been speaking? Watson's case, 2 Starkie, N. P. C. 128.

(2) Courteen v. Touse, 1 Campb. 43.

(3) See Hardy's case, 24 Howell's St. Tr. 755., by Buller J.

party who calls him; and leans strongly to the other side: here, there must be, in reason and justice, some restrictions as to the form and manner of putting questions. How often it happens, that a witness, in cross-examination, waits only for a hint, to shape a favourable answer, and is in effect the witness of the cross-examining party, though technically called the witness of the opposite side. To put strong leading questions to such a witness without limitation or reserve, is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial. An instance of the kind, here described, occurred on the trial of Hardy for high treason. (1) A witness, who was a member of the same corresponding society as the prisoner, having been examined on the part of the prosecution, and having made, on his cross-examination, a favourable representation of the political opinions and designs of the society, was asked, whether some of the members had not used certain expressions on the subject of petitioning; upon which, the Lord Ch. Justice Eyre reminded the counsel, that he could not put the very words into the witness's mouth; that this was contrary to the practice of his Court and to his opinion. And on the following day (2), when the subject occurred again, Mr. Justice Buller referred to the rule laid down by the Chief Justice, as the correct rule of practice; and added, "You may lead a witness upon a cross-examination, to bring him directly to the point as to the answer; but not to go the length, as was attempted yesterday, of putting into the witness's mouth the very words, which he is to echo back again."

Cross-examination.

In cross-examinations, the object of which is to sift evidence and try the credibility of the witnesses, a great latitude is allowed in the mode of putting questions. The rule, however, is still subject to certain limitations. A witness cannot be cross-examined as to any fact, which, if admitted, would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, in case he should deny the fact, and in this manner to discredit his

(1) 24 Howell's St. Tr. 659. (2) P. 755.

testimony (1); and if the witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. (2) In the application of this rule, the principal thing to be considered will be, whether the question is irrelevant to the points in issue between the parties. In an action for usury, it would be entirely immaterial and irrelevant, to cross-examine the witness respecting other contracts supposed to have been made by the defendant, unless the witness had first said that the contracts were the same; and that was the point in the case of Spenceley v. De Willot. So it would be irrelevant, to ask a witness in cross-examination, whether he had not attempted to dissuade another witness from attending the trial. (3) But it is not irrelevant, on the trial of a prisoner, to cross-examine the witness to this point, whether, in consequence of being charged with robbing the prisoner, he had not said that he would be revenged upon him, &c.; and if the witness should deny having used such a threat, evidence may be given to contradict him. (4)

If a witness is called by a party merely for the purpose of producing a written instrument, belonging to the party, which is to be proved by another witness, he need not be sworn; and, unless sworn, he will not be subject to cross-examination. (5) But if a witness is sworn, and proves an instrument (however formal the proof may be,) on the part of the plaintiff, he is to be considered a witness for all purposes, although he may be substantially the real defendant in the suit, and the defendant on the record a mere nominal party. (6)

When a witness has been once sworn to give evidence, the other party may cross-examine him, though he gave no evidence for the party that called him. (7) And it is reported to have been ruled at nisi prius, that if a witness has been once

(1) Spenceley v. De Willot, 7 East, 108.
(2) Harris v. Tippet, 2 Campb. 638.
(3) Ibid. 637.
(4) Yewin's case, 2 Campb. 638. n. before Lawrence J.
(5) See Part 2. Ch. 8. S. 2.
(6) Morgan v. Brydges, 2 Starkie, 314.
(7) Philips v. Eamer, 1 Esp. N.P.C. 357.

examined by a party, the privilege of cross-examination continues in every stage of the cause; so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. (1) In the case referred to, the witness might possibly have shewn a strong bias in favour of the first party that called him, and on this account perhaps a greater scope was granted to the adverse party than is usually allowed. It may happen, on the other hand, that the plaintiff calls a witness unwillingly, and from mere necessity, knowing him to be favourable to the other side: in such a case to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage; on the contrary, the Court might perhaps be induced to invest the plaintiff's counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel to treat such a witness strictly as his own, and confine him within the limits of an examination in chief.

Privilege of witness in not answering.

The privilege of witnesses, in not being compellable to answer certain questions, is a subject of some importance. The cases, here considered, are those, in which the witness might by answering subject himself to a penalty or criminal prosecution, to civil process, or to any kind of forfeiture; and lastly, where the question, put to him, is degrading to his character.

1. Where the answer might subject to penalties, &c.

First, a witness cannot be compelled to answer any question, which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. (2) Thus, on an indictment for a rape, the woman is not obliged to answer, whether on some former occasion she had not a criminal connection with other men or with particular individuals (3);

(1) Dickinson v. Shee, 4 Esp. N. P. C. 67.

(2) Sir J. Freind's case, 4 St. Tr. 6. Lord Macclesfield's case, 6 St. Tr. 649. R. v. Ld. G. Gordon, Doug. 593. Title v. Grevet, 2 Ld. Raym. 1088. 16 Ves. jun. 242. Preamb. St. 46 G. 3. c. 37. Hardy's case, 24 Howell's St. Tr. 720. Cates v. Hardacre, 3 Taunt. 424.

(3) Hodgson's case, by a majority of the Judges on a case reserved, 1812. MS. Dodd v. Norris, 3 Campb. 519.

nor is evidence of such criminal intercourse admissible. (1) So, on an appeal against an order of bastardy, a person cannot be compelled to acknowledge himself the father of a bastard child; but there is no objection to his being sworn, and, if he chooses, he may confess the fact. (2) So it has been held, in an action for a libel (3), which was published by the defendant in a voluntary affidavit sworn extrajudicially before a magistrate, that the magistrate's clerk is not bound to answer, whether he wrote the affidavit and delivered it to the magistrate, because the bare copying out of a libel is criminal.

Secondly, as to the case, where the witness, by answering might subject himself to a civil action, or charge himself with a debt. Considerable doubts have been entertained upon this point; some judges being of opinion, that he is not compellable to answer such questions, and others being of a contrary opinion.* To settle the rule of law on this subject, the stat. 2. Where the answer might subject to a civil suit.

(1) By the opinion of all the Judges in Hodgson's case, MS.

(2) R. v. St. Mary's, Nottingham, 13 East, 58. n.

(3) Maloney v. Bartley, before Wood B. 3 Campb. 210. A bill of exceptions was tendered, but afterwards dropped.

* This subject was much discussed, in the course of the impeachment against Lord Melville, and referred to the Judges for their opinion. The only report, which the author has seen, of these proceedings, is that to be found in the sixth volume of Cobbett's Parliamentary Debates; from which the following brief account is extracted. A bill had been brought into the House of Lords, to indemnify witnesses from criminal prosecutions and from civil process, to which they might be exposed by giving evidence. The indemnity from criminal prosecutions was agreed to; but from doubts arising with respect to the indemnification from civil process, several questions were referred to the Judges, with the view of ascertaining, whether persons were legally justified in refusing to answer questions, the result of which might subject them to a civil suit, (6 vol. Parl. Deb. p. 167.) Three questions were proposed; the object of the first and second was to ascertain, whether a witness could demur to answer a question, the result of which might render him liable to an action for debt, or to a suit for the recovery of the profits of public money; the object of the third was to ascertain, whether a witness, who on making a full and fair disclosure, was to be excused from certain debts, could be legally objected to, on the ground of his being in-

46 G. 3. c. 37, was introduced, which declares that a witness cannot legally refuse to answer a question, relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever,) on the ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. The rights which the parties to a suit have, to refuse answering any question, is not in any degree affected by this statute; and therefore on a question of settlement, a rated parishioner is not compellable by the adverse parish to give evidence, as he is directly interested as party to the appeal, and does not come within the words or meaning of the act. (1)

3. Where the answer might subject to forfeiture.

Thirdly, a witness is privileged from answering any question, the answer to which might subject him to a forfeiture of his estate. The declaratory statute, before referred to, implies, that a witness may legally refuse to answer any question, which has a tendency to expose him to forfeiture of any nature whatsoever. At the time of passing this act, when the general privileges of witnesses were much discussed, it was proposed

(1) R. v. Inhabitants of Woburn, 10 East, 395.

terested. (P. 222.) The Lord Ch. Justice Mansfield, who delivered the opinion of the Judges, stated, that upon the two first questions they were divided in opinion; and that on the third question they were unanimously of opinion, that a witness, in the situation described, could not be rejected on the ground of interest, since whatever might be offered, on condition of his making a fair and full disclosure, could legally make no difference with respect to his evidence, the witness being bound by his oath, by law, morality, and honour, to declare the truth, the whole truth, and nothing but the truth. (P. 223.) The House of Lords then called upon the Judges to deliver their opinions *seriatim* on the proposed questions. (P. 226, 227.) The Judges accordingly delivered their opinions in order. Four of the Judges (Lord Ch. Justice Mansfield, Grose J., Rooke J., and Thompson J.) were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a civil action; the other Judges, together with the Lord Chancellor, and Lord Eldon, were of the contrary opinion. (P. 234. 245.)

to insert in the act a proviso, that no mortgagee or *bonâ fide* purchaser or possessor of an estate should be compelled to answer any question, the answering of which might probably tend to defeat his title, or incur a forfeiture of his estate. This proviso was afterwards withdrawn. However, several of the Judges, who on that occasion were of opinion, that the liability to a civil action or to a pecuniary charge ought not to exempt a witness from answering questions, yet considered the probability or danger of incurring a forfeiture of estate to be a legal ground of exemption. And it is an established principle in courts of equity, that a party is not bound to answer so as to subject himself to pains or penalties, or to any kind of punishment, or to any forfeiture of interest. (1)

4. Where the answer might degrade the witness's character.

The last case, to be mentioned on this subject, is, where a question is asked, the answer to which has a direct tendency to degrade the witness's character, though it may not subject him to a criminal prosecution. If a witness, for instance, were to be asked, whether he had not suffered some infamous punishment, or if any other question of the same kind were asked, imputing guilt to the witness in some past transaction, and not relevant to the matters in issue, would he be compellable to answer? The inquiry here made, it is to be observed, relates only to such questions as are not relevant to the matters in issue; for if the transaction, to which the witness is interrogated, form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character. There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination maintain, that, as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that, on the cross-examination of spies, informers,

(1) The cases upon this subject are collected in Mitford's Treat. on Chanc. Pleadings, p. 157—163.

and accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered.—Those, on the other side, who maintain that a witness is not compellable to answer such questions, argue to the following effect: they say, the obligation to give evidence arises from the oath which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in gaol for felony, or suffered some infamous punishment, or the like,—cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses: that it would be an extreme grievance to a witness to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report, when, perhaps, by his subsequent conduct he may have recovered the good opinion of the world: that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question, to the disparagement and forfeiture of his character: that, in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of all the offences, about which they may be questioned; but that, with respect to other witnesses, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal.—Although there appears not to be any express decision on the point, whether a witness is compellable to answer

questions degrading to his character, yet several opinions have been pronounced by Judges of great authority, from which it may be collected, that the witness is not compellable to answer such questions. They are as follows:

1. In Cooke's case, reported in the State Trials (1), where a question arose, whether a juryman, who had been challenged, might be examined as to his having asserted the guilt of the prisoner before the trial, C. J. Treby said, " You may ask upon the voire dire, whether he has any interest in the cause, nor shall we deny you liberty to ask, whether he is qualified according to law by having a freehold of sufficient value: but that you may ask a juror (2) *or witness* every question that will not make him criminous, that is too large. *Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer;* for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and *if it be an infamous thing, that is enough to preserve a man from being bound to answer.* A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, *it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself.* So, *persons have been excused from answering, whether they have been committed to bridewell, as pilferers or vagrants, &c.;* yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

2. On the trial of Sir John Freind for high treason (3), a question arose as to the propriety of asking a witness, whether he was a Roman Catholic. The Court determined, that the question could not be asked, as the witness might by his answer subject himself to several penalties. C. J. Treby, on

(1) 4 St. Tr. 748. S. C. 1 Salk. 153.
(2) See also Co. Litt. 158. b.
(3) 4 St. Tr. 259 This opinion of Ch. Justice Treby was approved of by Lord Ellenborough in the case of R. v. Lewis, 1 Esp. N. P. C. 225.

that occasion, said, "No man is bound to answer any questions, *that will subject him to penalties or to infamy.* If you should ask him, whether he were a deer-stealer, or whether he were a vagabond, or any other thing that will subject him to punishment either by statute or by common law, whether he be guilty of a petty larceny, or the like, the law does not oblige him to answer any such questions."

3. In Layer's case (1), on an indictment for high treason, the prisoner insisted that a witness should be examined on the *voire dire*, whether he had a promise of pardon, or some other reward, for swearing against him; the point was argued by his counsel, and over-ruled by the Court. The Lord Ch. J. Pratt said, "You see, the most you can make of it is, that it is an objection to his credit; and if it goes to his credit, must he not be sworn, and his credit left to the jury? He must be examined as a legal witness. But *if this man under expectation or promise of a pardon, comes here to swear that which is not true, and you would ask him to that, he is not obliged to answer it. Nobody is to discredit himself*, but always to be taken to be innocent, till it appear otherwise. If *they, who ask the question, insinuate any thing like that*, (namely, that the witness can give no evidence except what is false,) *it ought not to have an answer*: but if he has a promise of pardon, if he gives true evidence, it is no objection to his being a witness, or to his credit." And Mr. Justice Fortescue Aland, referring to a case cited, where a similar point was made and over-ruled, said, "The reason the Court gave, (that it was improper to ask this question on the *voire dire*,) was, that if he had this promise, such promise was made either to speak the truth, or to speak a falsehood; *if it were to give just and true evidence, there was no harm in it; and if it was a promise of pardon for speaking what was not true, the witness was not bound to answer that question.*"

Whether questions, of such a description, may not be legally asked, is a very different point from that before con-

(1) 6 St. Tr. 259.

sidered, whether the witness is compellable to answer. It may be just to allow a witness the privilege of not answering in certain cases; but that the party, against whom the witness appears, shall not be allowed to ask the question, and force him to his privilege, is a proposition, which, if carried into practice, might often be attended with dangerous consequences. There are two *nisi prius* decisions, in which it seems to have been held, that a question, the object of which is to degrade the witness's character, cannot be properly asked. * How-

* R. v. Lewis, 4 Esp. N. P. C. 225. Macbride v. Macbride, Ib. 242.— The case of R. v. Lewis was a prosecution for an assault. The report states, that the prosecutor, *who was a common informer, and a man of a suspicious character*, was asked, in the course of the cross-examination, *whether he had not been in a house of correction*; Lord Ellenborough, it is said, *interposed, and stated, that this question should not be asked*. The Chief Justice, in support of this opinion, referred to the rule laid down by Ch. Justice Treby, before mentioned, that a witness is not bound to answer any question, the object of which is to degrade or render him infamous; and added, that he thought the rule ought to be adhered to. Now, it seems probable, from the reasoning of Lord Ellenborough, and from the former part of the report, stating, that the witness was a common informer and of a suspicious character, (which shews, that questions, reflecting upon his character, had been already asked without objection, and had been also answered,) it seems highly probable from these circumstances, that the witness, on being questioned as to the particular fact of his having been in a house of correction, either appealed to the Court for protection, or shewed an unwillingness to answer; and if, after this, the question had been repeated, it might be thought necessary to interpose, and intimate, that the witness could not be compelled to answer, and that the question, therefore, ought not to be pressed; this shews the application of the rule, which Lord Ellenborough cited as having been laid down by Ch. Justice Treby, as to the privilege of the witness in not answering, which would have been cited prematurely, if the single point in discussion were, whether the question could in the first instance be legally asked. The observation, here made, will perhaps have more weight, when it is remembered, that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation, a fact well known to all who are acquainted with the practice of that great master of the law of evidence. — Macbride v. Macbride, was an action of assumpsit; a woman, having given evidence of the plaintiff's demand, was asked on the cross-examination, whether she did not live in a state of concubinage with the plaintiff, when Lord Alvanley interposed, and is reported to have said, he thought

ever, there are many other cases, in which questions of this description have been allowed by the Court. (1) The opinion of Ch. Justice Treby, and the other Judges, before cited, upon the point, whether the witness is compellable to answer, imply, that there is no objection, in point of law, to the asking the question; but that the objection arises in a later stage of the cross-examination, namely, when an attempt is made to compel him to answer. They are as strong authorities for the one position as for the other. The same observation may be made also with respect to the statute before referred to; which seems to imply, that there is no legal objection to a question which may subject the witness to forfeiture, although, if the question is asked, he may legally refuse to answer. In addition to this, it may be observed, the common practice of courts of justice, before the most approved Judges, will abundantly furnish instances of such questions being asked, and not being disallowed as contrary to the rules of law: and it is difficult to see, how a question can properly be deemed illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence.

Privileged communications.

There is another privilege, relating to certain kinds of information, in the knowledge of a witness, which courts of justice will not permit him to disclose. This is not the privilege of the witness, but may be justly called a public privi-

(1) In the case of R. v. Edwards, 4 T. R. 440. on an application to bail a prisoner, the Court allowed the counsel to ask one of the bail, whether he had stood in the pillory for perjury; the question was objected to, but the objection was overruled. In Watson's case, for high treason, questions of this description were frequently asked. An instance occurred also in Lord Cochrane's trial; and in Hardy's case, 24 Howell's St. Tr. 726. See also, 11 East, 311.

questions as to general conduct might be asked, but not such as went immediately to degrade the witness. On the trial of O'Coigley and O'Connor, a question was asked in cross-examination, which threw an imputation on the witness, and the counsel was not allowed to repeat the question or follow it up by another; but here the witness had first appealed to the Court for protection. (26 Howell's St. Tr. 1353.)

lege, and is observed by courts of justice on a principle of public policy, and from regard to public interests. On the trial of Hardy for high treason, a witness, who had been employed by an officer of the executive government to collect information at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer, or the nature of the connection that had subsisted between himself and the officer. (1)

Another witness, in the course of the same trial, had made reports, from time to time, of the proceedings of some corresponding societies, and had made these reports by the advice of a third person, and under the impression, that the information, contained in the reports, would be transmitted to another quarter for the purpose of disclosure; this witness was asked, whether he had communicated his reports to a magistrate of any description (2); Lord Ch. Justice Eyre considered this a proper question; the witness, on answering in the negative, was then asked, to whom he had made the communication. This question was objected to; Lord Ch. Justice Eyre, upon this, said, "It is perfectly right, that all opportunities should be given, to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made appear, that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

The cross-examination of the same witness then proceeded, and the witness admitted, that he had communi-

(1) 24 Howell's St.Tr.753. on cross-examination of Groves. The same principle was acted upon in the prosecution of Horne Tooke for high treason; and in the prosecution of Walker and others for a conspiracy.

(2) Ib. p. 808; on cross-examination of Lynam.

cated what he knew to a friend, who advised him to communicate his reports of the proceedings to another person. He was then asked, whether that friend was a magistrate; this he answered in the negative: then came the question, who was the friend? This was objected to(1): and the objection was, that the person, by whose advice the information was given to a person standing in the situation of magistrate, was to all intents and purposes the informer, and that his name therforee could not be disclosed.(2) The Judges differed in opinion upon this point; the Lord Chief Baron Macdonald, and Mr. Justice Buller, were of opinion, that the question was proper; but the majority of the Court, consisting of the Lord Chief Justice Eyre, Mr. Baron Hotham, and Mr. Justice Grose, were of the opposite opinion. Lord Chief Justice Eyre said, "those questions, which tend to the discovery of the channels, by whom the disclosure was made to the officers of justice, are not permitted to be asked; that such matters cannot be disclosed, upon the general principle of the convenience of public justice; that all persons in that situation are protected from discovery; that it is no more competent to ask, who the person was that advised the witness to make a disclosure, than it is to ask, to whom he made the disclosure in consequence of that advice, or than it is to ask any other question respecting the channel of information, or what was done under it." Mr. Justice Grose considered the adviser of the witness to be substantially in the situation of an informer, and that his name therefore ought not to be revealed. Mr. Baron Hotham also considered the person to be an informer; the witness, he said, had made the communication to his friend, under an impression and full persuasion, that through him the intelligence might be conveyed to a magistrate; and that there was no distinction, he added, between making a disclosure to the magistrate himself, or making it to another person, who was to communicate it to the magistrate. The Judges, who were of opinion, that the question might properly be asked, admitted the general rule, and differed only in the application of that rule to the particular facts of the case. The Lord Chief

(1) 24 Howell's St. Tr. p. 811. (2) Ib. p. 814.

Baron said, if he were satisfied, that the friend, to whom the witness disclosed this matter, was in any way a link in the communication, he should certainly agree, that the rule applied to him; but this person not being connected either with the magistracy, or the executive government, the case did not appear to him to fall within the rule. Mr. Justice Buller admitted the rule with respect to the informer to the utmost extent: "if the name of the informer," he said, "were to be disclosed, no man would make a discovery, and public justice would be defeated." He admitted also, that if a middle man is made the channel of communication, he ought to receive the same protection, as the first person to whom it is mentioned. But he differed in opinion only as to the situation of the friend, respecting which this question arose: in his view of the evidence, he considered that the witness had communicated the information to another man, not for the purpose of prevailing upon him to make the disclosure to a magistrate, but merely to consult him for the purpose of making up his own mind, whether he should himself make the discovery; he was therefore of opinion, that the witness ought to be allowed to answer the question.

As it would not be proper to enquire, to what officer of government the information had been given, so neither can it be asked, whether the communication has been made by that officer to the government. (1) Upon the same principle, official communications, between the governor and law-officer of a colony, respecting the state of the colony, are privileged, and ought not to be disclosed. (2)—A point, which occurred in Layer's case, may also be properly mentioned in this place. (3) The Attorney-General, in that case, objected to the production of the minutes of the prisoner's examination, which had been taken in writing before the privy council; he objected, on account of the danger and public inconvenience, which might result from the disclosure of other matters contained in the same

(1) R. v. Stone, cited by Lord Ellenborough in R. v. Watson; 2 Starkie, 136.

(2) Wyatt v. Gore, 1 Holt, N. P. C. 299.

(3) 6 St. Tr. 288.

writings; and the Lord Chief Justice (Sir J. Pratt) decided, that they could not be produced without his consent; in consequence of which, parol evidence of the examination was admitted.

Memorandum.

A witness can depose only to such facts as are within his own recollection. But, to assist his memory, he may use a written entry in a book, or a memorandum, or the copy of a memorandum; such entry or memorandum having been made at the time when the fact occurred, or recently afterwards: and if, after looking at the memorandum, he can positively swear to the truth of the fact there stated, such evidence will be sufficient. But if he cannot, from recollection, speak to the fact any further, than as finding it stated in a written entry, his testimony will amount to nothing. (1) The entry, to which the witness has recourse for assisting his recollection, ought to have been made by the witness himself, or, if made by another, examined by him, while the fact was fresh in his memory. (2) It is always usual, and very reasonable, when a witness speaks from memoranda, that the counsel should have an opportunity of looking at them, when he is cross-examining the witness. (3)

Opinion of witness.

In general, the opinion of a witness is not evidence: he must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but are allowed also to give their opinions in evidence. The opinion of a medical man is evidence as to the state of a patient. The opinion of a person conversant with the business of insurance, on the question, whether a premium would have been increased by the communication of particular facts, has been thought admissible, as judgment in a matter of trade. (4) So, ship-builders have been admitted to state their

(1) Sandwell v. Sandwell, by Holt C. J. Comberb. 445. Doe v. Perkins, 3 T. R. 752. Tanner v. Taylor, ib. 754. 8 East, 284. 289.

(2) Burrough v. Martin, 2 Campb. 112.

(3) By Lord Ch. Just. Eyre, in Hardy's case, 24 Howell's St. Tr. 824.

(4) Barthon v. Loughman, 2 Starkie, 258.

opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (1) So, in an action of trespass for making an embankment, which was said to have gradually choaked up a harbour, an engineer was permitted to prove from his own experiments, what were the effects of natural causes upon that particular harbour and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour. (2) So, where the question is, whether a seal has been forged, seal-engravers may be called to shew a difference between a genuine impression and that supposed to be false. (3) Persons, much practised in examining hand-writing, and in detecting forgeries, may give their opinion, whether a particular specimen of writing is in a natural or imitated character. (4) And the opinion of an artist in painting is evidence as to the genuineness of a picture.

Credit of witnesses impeached.

There are several ways of impeaching the credit of a witness.

1. The party, against whom a witness is called, may disprove the facts stated by him, or may examine other witnesses as to his general character: but they will not be allowed to speak of particular parts of his conduct; for, "though every man is supposed to be capable of supporting the one, it is not likely that he should be prepared to answer the other without notice (5);" and even if he should happen to be prepared to defend himself, such evidence might generally afford a very slight and imperfect test of his credibility. The regular mode is, to enquire, whether they have the means of knowing the former witness's general character, and whether

(1) Thornton v. Royal Exch. Ass. Company, Peake, N. P. C. 25. Chaurand v. Angerstein, do. 43. Beckwith v. Sydebotham, 1 Campb. 117.

(2) Folkes v. Chad, 1783, MS. S. C. cited by Buller J. in Goodtitle v. Braham, 4 T. R. 498.

(3) By Ld. Mansfield, in Folkes v. Chad, ib.

(4) Revet v. Braham, 4 T. R. 497.

(5) Bull. N. P. 296. Rookwood's case, 4 St. Tr. 693. Layer's case, 6 St. Tr. 298. 316. De La Motte's case, 21 Howell's Coll. St. Tr. 811.

from such knowledge they would believe him on his oath. (1) In answer to such evidence against character, the other party may cross-examine the witnesses as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and by fresh evidence support the character of his own witness.

If a witness, on being questioned, whether he has not been guilty of a felony or of some infamous offence, deny the charge, the party, against whom the witness has been called, will not be allowed to prove the truth of the charge (2): such evidence is not admissible, either for the purpose of contradicting, or of discrediting him. This principle has been established by many cases of great authority. In the case of Rookwood, who was tried for high treason (3), the point was considered as too clear for argument:—" Look ye," said Lord Ch. Justice Holt, " you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, that we will try at this time, whether he be guilty of robbery." And on the trial of Layer for high treason (4), Lord North and Grey being called, on behalf of the prisoner, to give a report of the character, which one of the witnesses for the prosecution had given of himself much to his disadvantage, the Lord Chief Justice Pratt said to the prisoner's counsel, " You know what the rule of practice and evidence is, when objections are made to the credit and reputation of the witness; you cannot charge him with particular offences: for if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to particular facts, to charge the reputation of any witness; but you are to ask in general, what is his character and reputation." And in summing up the case to the jury, the Chief Justice said, " The

(1) Rookwood's case 4 St. Tr. 693. Mawson v. Hartsink, 4 Esp. N. P. C. 102.

(2) Rookwood's case, and Layer's case, cited (5) prec. page. R. v. Watson, 2 Starkie, 149. Sharpe v. Scoging, 1 Holt. N. P. C. 541. See also Spenceley, q. t. v. De Willot, cited supra.

(3) 4 St. Tr. 693. Fol. Ed. 13 Howell, St. Tr. 211.

(4) 6 St. Tr. 298. 316. Fol. Ed. 16 Howell, St. Tr. 246. 286.

reason, why particular facts are not to be given in evidence to impeach the character of the witness, is, that if it were permitted, it would be impossible for that witness, having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the characters of witnesses might be vilified, without having any opportunity of being vindicated." The point was much discussed in the late trial of Watson, for high treason; and the principle above laid down, which had been settled so long before, was again recognised and fully confirmed.

2. The credit of a witness may be impeached, by proof that he has made statements out of court, on the same subject, contrary to what he swears at the trial. (1) A letter, therefore, written by him, or a deposition signed by him, may be used as evidence to contradict his testimony; but a conviction before a magistrate, purporting to set out the deposition of a witness, is not evidence for this purpose. (2)

Evidence in support of character.

In answer to such contradictory evidence, and for the purpose of corroborating the testimony of the witness, Ch. B. Gilbert was of opinion, that the party, who called the witness, might shew, that he affirmed the same thing before on other occasions, and that he is still consistent with himself. (3) This however has been doubted, and with good reason. Mr. Justice Buller lays it down, that such evidence is clearly not admissible in chief, and it seems doubtful, he adds, whether it is so in reply. (4) And Lord Ch. Justice Eyre is represented as having rejected such evidence, even when offered on behalf of a defendant in a prosecution for perjury.* It may

(1) De Sailly v. Morgan, 2 Esp. N. P. C. 691. Christian v. Coombe, 2 Esp. N. P. C. 489.

(2) R. v. Howe, 6 Esp. N. P. C. 123. 1 Campb. 461. S. C.

(3) Gilb. Ev. 135. See Lutterel v. Reynell, 1 Mod. 282., and Sir J. Freind's case, 4 St. Tr. 613., where this confirmatory evidence was offered *in chief;* which would not now be allowed.

(4) Bull. N. P. 294.

* So said by Lord Redesdale, in the Berkeley-peerage case, 5th June, 1811. The occasion of the discussion, which took place, was as follows:

be observed on this kind of evidence, in general, that a representation without oath can scarcely be considered as any confirmation of a statement upon oath. It is the oath, that confirms; and the bare assertion, that requires confirmation. The probability is, that in almost every case the witness, who swears to certain facts at the trial, has been heard to assert the same facts before the trial; and it is not so much in support of his character that he has given the same account, as it would be to his discredit that he should ever have made one different. The imputation on his veracity results from the fact of his having contradicted himself, and this is not in the least controverted or explained by the evidence in question. If a witness has made a statement a hundred times in one way, and a hundred times in another way directly contrary, the only inference must be, that he is utterly destitute of all title to credit. In one point of view, a former statement by the witness appears to be admissible in confirmation of his evidence; and that is, where the counsel on the other side impute a design to misrepresent from some motive, of interest or relationship, &c.;

One of the peers enquired of a witness, who had been cross-examined and re-examined, as to statements made by Lady Berkeley, on a former occasion, respecting her supposed marriage. The Solicitor-General suggested to the Commitee, whether this was the regular course of proceeding, and stated what he conceived to be the general rule upon the subject. The admissibility of the former statements was then much discussed. After the arguments of counsel on both sides, Lord Redesdale said, he had always understood, that for the purpose of impugning the testimony of a witness, his declarations at another time might be enquired into, but not for the purpose of confirming his evidence. And the Lord Chancellor expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause; but considering the House as in some degree standing both in the situation of the counsel for the claimant, and of the counsel against the claimant, he was of opinion, that the question might be properly asked, by the House, though it could not be asked by the counsel on one side; but with respect to the answer to the question, it might be the subject of future consideration, whether it ought to stand upon the minutes as evidence. The question, respecting the former representations of Lady Berkeley, was therefore repeated by one of the Lords, and the answer entered among the minutes, subject to future revision. MS.

there, indeed, in order to repel such an imputation, it might be proper to shew, that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts.

If an attesting witness to a will or deed impeach its validity on the ground of fraud, and accuse other subscribing witnesses, who are dead, of being accomplices in the fraud, the party claiming under the instrument may give evidence of their general good character. For, if living, they might be produced as witnesses, and their character would then appear in cross-examination; and after their death an opportunity ought to be given, to shew what credit is to be attached to their attestation. (1) But in a case, where a witness for the plaintiff asserts one thing, and a witness for the defendant asserts another, and direct fraud is not imputed to either, evidence to general character is not admissible. (2)

A party will not be permitted to produce general evidence, to discredit his own witness. "This," says Mr. J. Buller, "would enable him to destroy the witness, if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him." (3) The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character, as would make him unworthy of credit. If he knew the infamy of his character, he was practising a fraud upon the court in producing him as a witness. But if a witness unexpectedly give evidence against the party that called him, another witness may be called to prove those facts otherwise; "for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential." (4)

(1) Doe dem. Walker v. Stephenson, 3 Esp. N. P. C. 284., 4 Esp. N. P. C. 50.; cited and approved in 1 Campb. 210.

(2) Bp. of Durham v. Beaumont, 1 Campb. 207.

(3) Bull. N. P. 297.

(4) Bull. N. P. 297.

Thus, where the question was, whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, he swore on being called by the plaintiff, that he had not given any warranty; and Lord Ellenborough allowed the plaintiff to call another witness to prove, that at the time of the sale he had expressly warranted its soundness. There can be no rule of law, said Lord Ellenborough, by which the truth on such an occasion is to be shut out, and justice perverted. (1)

(1) Alexander v. Gibson, 2 Campb. 556. Bull. N. P. 297. Richardson v. Allan, 2 Starkie, N. P. C. 334., is another example.

CHAP. IX.

Of Bills of Exceptions, and Demurrers to Evidence.

THE competency of witnesses and the admissibility of evidence are to be decided by the Judge who tries the cause, and from his judgment there is an appeal by a bill of exceptions.

Bill of exceptions.

At common law, a writ of error could not be brought for any error in law, which did not appear on the record; and therefore, where the plaintiff or defendant alleged any thing ore tenus, which was over-ruled by the Judge, the party aggrieved had no redress. (1) To remedy this defect, it was enacted by stat. 13 Ed. 1. s. 31., "if one impleaded before any of the justices allege an exception, praying that the justices will allow it, that, if they will not, and if he write the exception and require the justices to put their seals to it, the justices shall do so, and if one will not, another shall."

This statute extends to the plaintiff as well as the defendant (2), and to a trial at bar as well as at nisi prius. (3)

(1) 2 Inst. 426.
(2) 2 Inst. 427.
(3) Thurston v. Slatford, 3 Salk. 155. Adm. per Cur. in Duchess of Grafton v. Holt, Skin. 354. R. v. Smith, 2 Show. 287., contra.

But it has been doubted, whether it extends to criminal cases. Lord Coke, in his exposition of the statute, states, that it extends to all actions, real, personal, and mixed; but of criminal cases he makes no mention. In the case of Sir H. Vane (1), who was tried for high treason, the Court refused to sign a bill of exceptions, "because," they said, "criminal cases were not within the statute, but only actions between party and party." From this authority Mr. Serjt. Hawkins infers only, that a bill of exceptions is not allowable on an indictment for treason or felony. (2) "Whether a bill lies not in any criminal case," said Lord Hardwicke, "is a point not settled." (3) It was allowed in the case of the King against Lord Paget and others, on an indictment for a trespass (4), and also on an information in the nature of a quo warranto. (5) But Lord Hardwicke, in the case before referred to, after saying "that he had known a bill of exceptions allowed in informations in the Court of Exchequer, which are civil suits for the king's debt," added, "it has never been determined to lie in mere criminal proceedings in other courts." (6) A bill of exceptions cannot be allowed by the justices of the peace at the quarter sessions on the hearing of an appeal against an order of removal. (7) It can be used only on a writ of error, and therefore where a writ of error will not lie, there cannot be a bill of exceptions. (8)

A demurrer to evidence is a proceeding, by which the judges, whose province it is to determine questions of law, are called upon to declare what the law is upon the facts in evidence. And it is analogous to the demurrer upon facts alleged in pleading. (9) Demurrer to evidence.

When the admissibility of the evidence has been established,

(1) 1 Lev. 68.; Kel. 15. S. C.; 1 Sid. 85. S. C.
(2) Pl. Cr. b. 2. c. 46. s. 210.
(3) R. v. Inhabitants of Preston, Rep. temp. Hard. 251.
(4) 1 Leon. 5.
(5) R. v. Higgins and others, 1 Ventr. 366.
(6) Rep. temp. Hard. 251. R. v. Stratton and others, Howell's Coll. St. Tr. 21 vol. 1187.
(7) See (3).
(8) Bull. N. P. 316.
(9) See the judgment of Eyre C. J. in Gibson and Johnson v. Hunter, 2 H. Bl. 205. 206.

the question, how far it conduces to the proof of the facts, which are to be ascertained, is not for the judge to decide, but for the jury exclusively. And when the jury have ascertained the fact, if a question arises, whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact is in favour of one or other of the parties, that question is for the judge to decide. (1) Ordinarily, he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact. But if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence. (2)

It is reasonable that either party should have such a power of referring to the Court to decide what the inference of law is upon the facts; as the jury may refuse to find a special verdict, in which case the facts would not appear on the record. On the other hand, as it is the peculiar province of the jury, to ascertain the truth of facts and the credibility of witnesses, the party ought not to be allowed, by a demurrer to evidence, or any other means, to refer the trial of such questions to another tribunal. A demurrer must therefore admit the truth of all facts, which the jury might find in favour of the other party upon the evidence laid before them, whatever the nature of that evidence may be, whether of record, or in writing (3), or by parol. (4) According to Alleyn's report of the case of Wright v. Pindar, it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the Court; and if the matter of fact is uncertainly alleged, or it is doubtful whether it be true or no, because offered to be proved only by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the Court, that he may not be admitted to his de-

(1) 2 H. Bl. 205.
(2) Ib.
(3) Baker's case, 5 Co. Rep. 104.
(4) Wright v. Pindar, Alleyn, 18.

murrer, unless he will confess the matter of the fact to be true." And now it is an established rule, that in a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the proposed evidence conduces to prove. (1)

If in an information, or any other suit, evidence be given for the king, and the defendant offers to demur upon it, the king's counsel cannot be compelled to join in demurrer, but in such case the Court ought to direct the jury to find the special matter; and upon that they shall adjudge the law. (2)

When all matters of fact are admitted, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record, it will remain for the decision of the judges. (3)

The whole proceeding upon a demurrer to evidence is under the control and direction of the Judge at nisi prius, or of the Court on a trial at bar. The Court, said Mr. J. Doddridge in the case of Worsley v. Filisker (4), may deny and hinder a party from demurring, by over-ruling the matter in demurrer, if it seem to them to be clear in law. And in that case the Court did over-rule the demurrer, and left the case to the jury.

(1) Gibson and Johnson v. Hunter, 2 H. Bl. 187.
(2) 5 Co. Rep. 104.
(3) 2 H. Bl. 208.
(4) 2 Roll. Rep. 119. Bull. N. P. 314.

END OF PART I.

PART THE SECOND.

ON WRITTEN EVIDENCE.

THE preceding chapters having treated of the competency of witnesses and of parol or unwritten evidence, it is now proposed to enquire into the several kinds of written evidence.

Writings are either public or private. Some public writings are of record; others, not of record. And public writings, not of record, may be distinguished into such as are of a judicial character, and such as are of a public nature, but not judicial. In this order it is proposed to treat of the several kinds of written evidence; and to consider, first, in what cases they are admissible; and, secondly, if admitted, how they ought to be proved.

CHAP. I.

Of Acts of Parliament.

Records. RECORDS are the memorials of the proceedings of the legislature, and of the King's courts of justice, preserved in rolls of parchment; and they are considered of such authority, that no evidence is allowed to contradict them. (1) Thus, if a verdict, finding several issues, were to be produced in evidence, the opposite party would not be allowed to shew that no evidence was offered on one of the issues, and that the finding of the jury was indorsed on the postea by mistake. (2) An officer, who has the care and custody of records, may be

(1) Co. Lit. 117. b. 260. a. Lamb. Just. B. 1. c. 13. p. 71. Gilb. Ev. 5. Bull. N. P. 221. Glynn v. Thorpe, 1 Barn. Ald. 156. R. v. Hopper, 3 Price, 495.

(2) Reed v. Jackson, 1 East, 355.

examined as to their condition, but he cannot be examined as to their matter or contents. (1)

A record, then, is conclusive proof, that the decision or judgment of the Court was, as is there stated: and evidence to contradict it will not be admitted. But it will not be conclusive as to the truth of allegations, which were not material nor traversable. (2) Thus, for example, a party will not be estopped from averring in an action of debt on a bond, that the bond was made at A, though in a former action upon the same bond, he averred it to have been made at B. (3) So, in the case of a conviction for felony, &c., where the jury have given a general verdict, the record will not be conclusive, that the offence was committed on the day mentioned in the indictment, for the time is not of the substance of the charge; and, therefore, a party interested to dispute the forfeiture, (which, in the case of real property, relates to the time of the offence,) may falsify the record, and shew that the offence was committed on another day. (4) But if the jury find specially the precise day, all parties are concluded. (5)

Acts of parliament.

The first sort of records to be considered are acts of parliament; and these, says Ch. B. Gilbert, are the highest and most absolute proof. Acts of parliament relate either to the kingdom at large, when they are called general acts; or only to particular classes of men, or to certain individuals, in which case they are called private acts. Laws which concern the king, or all lords of manors, or all officers in general, or all spiritual persons, or all traders, &c. are public laws. But such as relate to the nobility only, or to spiritual lords, or to particular trades, are private acts. (6) This distinction between public and private acts is not applied, in collections of the English statutes at large, to any statutes previous to those of Richard the Third. From that period the distinction

(1) Leighton v. Leighton, 1 Str. 210.

(2) Co. Lit. 352. b.

(3) Com. Dig. tit. Estoppel, E. 6.

(4) Ives's case, 3 Inst. 230. Gilb. Ev. 230.

(5) Gilb. Ev. 230.

(6) Gilb. Ev. 39, 40.

commences in the several tables prefixed to the respective collections. (1)

Public acts. The general rule is, that public acts of parliament are to be taken notice of judicially by courts of law, without being formally set forth; but particular or private acts are not regarded by the judges, unless formally shewn and pleaded. (2) In some cases, however, the necessity of pleading a private act has been dispensed with; as, where there is a special clause, enabling the defendant, in answer to any action for matters done under the act, to plead the general issue; or, where the private act has been recognised by some public act of the legislature. Thus, the statute 23 H. 6. c. 9., relative to sheriffs' bonds, (even supposing it in its original constitution to be a private act, as relating only to officers of a certain description, which however according to the best authorities it is not,) must now be taken notice of judicially, because the statute 4 & 5 Ann. c. 16. s. 20. enables the sheriff to assign the bond, and thus makes it a general law. (3)

Preamble of acts. The preamble of an act of parliament, reciting that certain outrages had been committed in particular parts of the kingdom, has been adjudged by the Court of King's Bench in a late case to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (4) Public acts of parliament, it was said, are binding upon every subject; the Judges are bound to take judicial notice of their contents; every subject is, in judgment of law, privy to the making of them, and supposed to know them; the passing of an act of parliament is a public proceeding in all its stages, and when the act is passed, it is, in the contemplation of law, the act of the whole body of the kingdom. The Court of King's Bench, for these reasons, were of opinion that the preamble in question had been properly admitted in evidence.

(1) See preface to new edit. of Statutes at Large.

(2) Bull. N P. 222.

(3) Saxby v. Kirkus, Bull. N. P. 224. Samuel v. Evans, 2 T. R. 575.

(4) R. v. Sutton, 4 Maule & Selw. 532.

In many cases a defendant will be precluded, by the nature of the pleadings, from taking advantage of a public act of parliament. Thus, in an action of debt upon a bond, the defendant cannot, under the plea of *non est factum*, avail himself of the statute 13 Eliz. c. 8. s. 4. (1), which makes usurious contracts utterly void. But if he pleads that the bond was void on account of usury, he may insist upon the statute, though he has not formally recited it. (2) In an action of assumpsit, indeed, where the defendant may give in evidence any thing that discharges the debt or proves nothing due, he may shew under the general issue, that the contract was usurious (3), or founded on an illegal consideration which makes the contract void. (4)

Public act, when to be pleaded.

If an action or information be brought upon a penal statute, and there is another statute which exempts or discharges the defendant from the penalty, this latter act, as some books lay down the rule, cannot be given in evidence under the general issue, but ought to be pleaded; for the general issue is but a denial of the plaintiff's declaration, and the plaintiff, it is said, has proved him guilty, when he has proved him within the law upon which he founds his declaration. (5) It is, indeed, enacted by statute 21 Jac. 1. c. 4. s. 4., that, in actions on penal statutes, it shall be lawful for the defendant to plead not guilty, or that he owes nothing, and to give in evidence such special matter, which, if pleaded, would have discharged the defendant at law: but this statute has been generally considered to attach only on antecedent penal laws, and not to extend to those subsequently enacted. (6) However, with respect to these also, it should seem, according to the modern practice, the defendant may plead *nil debet*, and give in evidence the statute; which would show, that he does not owe

(1) See also 12 Ann. St. 2. c. 16.

(2) Com. Dig. tit. Pleader, 2 W. 23.

(3) Ld. Bernard v. Saul, 1 Str. 498. Bull. N. P. 152. S. C.

(4) Adm. per Cur. in Hussey v. Jacob, 1 Ld. Raym. 89.

(5) 2 Roll. Ab. 683 pl. 13. Bull. N. P. 225.

(6) Gaul's case, 1 Salk. 372. Hicks's case, ib. by Lord Mansfield in 4 Burr. 2467. Bull. N. P. 196. French q. t. v. Coxon, 2 Str. 1081. S. C. more fully stated in 2 Selw. N. P. 662. n (117.)

the penalty. Thus, on a prosecution for exercising a trade contrary to the provisions of a statute, the defendant may show, under the general issue, that he is exempted from penalties by a subsequent statute (1); and on the trial of an indictment against a parish for not repairing a highway, the defendants may on the general issue give in evidence an act of parliament, which exempts them from the repair, and transfers it to commissioners. (2) And if the same act, which imposes the penalty, contains also the proviso of exemption, it is quite clear that this proviso may be shewn under the general issue. (3)

(1) R. v. Pemberton, 1 Blac. Rep. 230.

(2) R. v. Inhabitants of St. George, 3 Campb. 222.

(3) Sutton v. Bishop, 4 Burr. 2284. Sibly v. Cuming, 4 Burr. 2469. Bull. N. P. 225.

CHAP. II.

Of Verdicts and Judgments of Courts of Record.

IN treating of judicial proceedings, and inquiring in what cases they are admissible in evidence, it is proposed to consider, first, the verdicts and judgments of courts of record; secondly, the judgments of courts of exclusive jurisdiction; and, thirdly, certain other proceedings of an inferior kind.

The admissibility of verdicts and judgments of courts of record is the subject of the present chapter, in which will be considered, first, their admissibility, with reference to the parties in the suit; secondly, their admissibility, with reference to the subject-matter of the suit; thirdly, the admissibility, in civil cases, of verdicts, which have been given in criminal prosecutions.

Sect. I.

Of Verdicts and Judgments, with reference to the parties in the Suit.

The general principles, which govern this subject, are clearly laid down in the celebrated judgment delivered by the Chief Justice De Grey, on a question referred to the judges in the prosecution of the Duchess of Kingston. (1)

"It is true as a general principle," said the Chief Justice De Grey, in delivering the opinion of the judges, "that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person, who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Hence the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, and the judgment of the court on facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. (2) To this general rule there are some exceptions, founded upon particular reasons, which will be stated in the course of the present chapter. General rule.

"From the variety of cases," continued Ch. J. De Grey, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow, as generally true: first, that the judgment of a court of *concurrent* jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of *exclusive* jurisdiction, directly upon the point, is in like manner conclusive upon the same matter

(1) 11 St. Tr. 261 22 Howell's St. Tr 538. S. C.
(2) Judgment of De Grey C. J. in Duchess of Kingston's case, 11 State Tr. 261

coming incidentally in question in another court, between the same parties, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Effect of judgment between same parties, when pleaded.

First, then, a judgment directly upon the point, is, as a plea, a bar between the same parties. A party may be estopped by a verdict on record: as, in an action of trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say, that in a former action by the plaintiff against the defendant, the same prescription was found against the plaintiff. (1)

A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject-matter of such title, if pleaded by way of estoppel; but, unless so pleaded, it will not be conclusive. (2) In Trevivan v. Lawrence (3), it was held, that if a party will not rely on the estoppel, when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact. And in the late case of Vooght v. Winch (4), an action on the case for widening a water-channel to the damage of the plaintiff's mill, the Court of King's Bench held, that a verdict obtained by the defendant in a former action, brought by the plaintiff for the same cause, was not conclusive as evidence under the general issue, though it would have had that effect, if it had been pleaded in bar by way of estoppel. When a judgment is pleaded as an estoppel, the plaintiff will not be allowed to discuss the case with the defendant, and for the second time to disturb and vex him by the agitation of the same question: but

(1) Com. Dig. tit. Estoppel, (A. 1.) p. 73. citing 1 Show. 28. The case is Incledon and another v. Burgess. The doubt there was, whether this was a good estoppel as against a co-plaintiff, a stranger to the former action; and the Court gave judgment on another point. On this subject, see the judgment in the case of Outram v. Morewood, 3 East, 354, 355.

(2) 3 East, 354. 365.

(3) Salk. 276. cited by Holroyd J. 2 Barn. Ald. 672.

(4) 2 Barn. Ald. 662.

if the defendant plead not guilty in the second action, he has thereby elected to submit his case to the jury, who are to give their verdict upon the whole evidence submitted to them. (1) The jury, upon the general issue, are to try, not whether the plaintiff is estopped from trying the question, but whether the defendant be guilty of the wrongful act imputed to him. (2)

In the case of Moses v. Macferlan (3), the Court of King's Bench held, that the plaintiff might recover back money, which he had paid under a judgment obtained against him by the defendant in an action in a court of conscience, which action the defendant brought against him as indorser of a bill of exchange, in breach of a written agreement. They admitted it, however, to be a clear principle, that the merits of a judgment can never be overruled by an original suit either at law or in equity; and that the judgment is conclusive, as to the subject-matter, until it is set aside or reversed. The ground of the decision in that case was, that the breach of the agreement was no defence to the action in the court of conscience, being a collateral matter not within their cognizance. But this has been since questioned (4); and it has been thought, that the breach of the agreement went to the essence of the debt demanded, and was necessarily as much a defence in that court, as it would have been in the Court of King's Bench. The case of Moses v. Macferlan, therefore, does not in any manner infringe, but rather confirms the general rule, that the merits of a question, which has been directly determined by a court of competent jurisdiction, cannot be tried over again, between the same parties, in any shape whatsoever.

The authority of a former adjudication of the right prevails between the same parties, that is, between the same persons suing or sued in the same quality or character. A Who, the same parties.

(1) By Ch. Justice Abbott, 2 Barn. Ald. p. 668.
(2) By Bayley J. ib 669.
(3) 2 Burr. 1006. 1009.
(4) By Eyre C. J. in Philips v. Hunter, 2 H. Bl. 414. And see Marriott v. Hampton, 7 T. R. 269. Brown v. M'Kinnally, 1 Esp. N. P. C. 279.

woman is not estopped after coverture, by an admission upon record by her husband and herself during-coverture. (1) An heir, claiming as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother. (2) A party suing as executor, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sued as administrator; but he may shew that the letters of administration have been since repealed. (3) For the same reason, an acquittal of a person as accessory cannot be pleaded by him in bar, on a charge against him as principal; for the quality and nature of the offences are quite different. (4)

A verdict against two defendants will be evidence in an action, upon the same subject-matter, against one of the defendants alone, if he alone was substantially interested in the former action, and the other defendant was joined with him merely for form. Thus, where a person brought an action of trover against a creditor and the sheriff, for goods levied under an execution, in which action the plaintiff failed, and afterwards he brought an action of assumpsit against the creditor alone, to recover the proceeds of the sale of the goods, the judgment in the first action was held to be a bar to the second action. (5)

Who, the real parties.

In considering the effect of verdicts and judgments, courts of justice will always take notice of the real parties to the suit. In an action of ejectment, the lessor of the plaintiff and the tenant in possession, are judicially considered the real parties. (6) For the same reason, in the case of Kinnersley v. Orpe (7), which was an action for a penalty incurred by destroying fish in the plaintiff's fishery, a verdict for the plaintiff in a former action, for a trespass committed in the same fishery, against one who justified as servant, was allowed to be evi-

(1) Com. Dig. tit. Estoppel (C).
(2) Ib.
(3) Robinson's case, 5 Rep. 32. b.
(4) 2 Hal. P. C. 244. Fost. Disc. 361.
(5) Hitchin v. Campbell, 2 Black. 827.
(6) Aslin v. Parkin, 2 Burr. 668.
(7) 2 Doug. 517. See the observation on this case in Outram v. Morewood, 3 East, 366.

dence against the defendant. At the trial of the cause, this was admitted after argument, as conclusive evidence of the plaintiff's right of fishery; as it appeared, that the defendant in the second suit acted by the command of the same person, under whom the defendant in the first action had justified, and who was considered by the judge to be the true party in both causes. The Court of King's Bench, afterwards, on a motion for a new trial, considered the evidence admissible, though not conclusive.

Estoppels by verdict, admissions on record, &c. bind privies in blood, (as the heir,) privies in estate, (as feoffee, lessee, &c.) and privies in law (as lord by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others who come in by act of law in the *post*,); in the same manner, persons standing in either of these relations will be bound, equally with the parties themselves, by a judgment in a former action for the same matter, if pleaded in bar. (1) Effect, between privies.

A verdict or judgment in a former action, upon the same matter directly in question, is evidence for or against privies in blood, privies in estate, and privies in law, as well as for or against the parties to the suit. If an ancestor has obtained a verdict, the heir may give it in evidence as privy to it. (2) If several estates in remainder be limited in a deed, and one of the parties in remainder obtain a verdict, in an action brought against him for part of the land, that verdict may be given in evidence by another person in remainder, in an action brought against him for the same land, although he does not claim any estate under the first remainder-man; because they all claim under the same deed. (3) So, a verdict for or against a lessee is evidence for or against the reversioner. (4) A verdict on a question of

1. Privy in blood.

2. Privy in estate.

3. Privy in law.

(1) Co. Lit. 352. *a*. Com. Dig. tit. Estoppel (B). Outram v. Morewood, 3 East, 346. Lady Dartmouth v. Roberts, 16 East, 334.

(2) Per Cur. in Lock v. Norbonne, 3 Mod. Rep. 142.

(3) Pyke v. Crouch, 1 Ld. Raym. 730. Com. Dig. tit. Evidence, (A 5.) Bull. N. P. 232.

(4) Per Cur. in Rushworth v. Countess of Pembroke and Currier, Hardr. 472. Com. Dig. ib. Bull. N. P. 232. Gilb. Ev. 35, 36. Bp. of Lincoln v. Sir W. Ellis, 2 Gwill. 632.

tithes, between a vicar and an occupier of land in the parish, is evidence between him and another occupier, the vicar in both suits claiming the same general right to tithes. (1) And a decree in the Court of Exchequer in a cause between the vicar on one side and the impropriator on the other, (establishing the vicar's title to small tithes under an ancient endowment against the defendant, who insisted that he was only entitled to an annual payment in lieu of tithes,) is evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it would be, if the ordinary had been a party to the first suit. (2) So, a judgment for or against the schoolmaster of a hospital, concerning the rights of his office, has been admitted to be evidence for or against his successor. (3) And so, where, on an information in the nature of a quo warranto against the defendant, for acting as bailiff of a corporation, the defendant pleaded that he had been duly elected under a nomination by two persons, who were bailiffs of the corporation, and the point in issue was, whether they were bailiffs at the time of the election, the record of a judgment of ouster in a quo warranto against them, was adjudged to be good evidence against the defendant, who claimed under them.* (4) These cases fully establish the rule above laid down, that a verdict or judgment directly upon the point is good evidence, not only for or against the parties to the suit, but also for or against any persons standing in the relation

(1) Travis v. Chaloner, 3 Gwill. 1237. And see Ashby v. Power, 3 Gwill. 1239. Benson v. Olive, 2 Gwill. 701.

(2) Carr v. Heaton, 3 Gwill. 1261.

(3) Lord Brounker v. Sir R. Atkins, Skin. 15.

(4) R. v. Hebden, Andr. 388.; 2 Str. 1109. S. C. Bull. N. P. 231. S. C.; 2 Selw. N. P. 1047., cited from MS. R. v. Grimes, 5 Burr. 2601. S. P.

* Judgment of ouster has been considered in the nature of a judgment *in rem*. In the case of the King v. the Mayor of York, 5 T. R. 72., where the cases of R. v. Hebden and R. v. Grimes were cited in argument, in order to shew that such a judgment cannot be conclusive against third persons, Lord Kenyon is reported to have said, "If you derive title to a corporate office through A., and the prosecutor shew a judgment of ouster against A., it is conclusive against you, unless you can impeach the judgment as obtained by fraud."

before mentioned, of privies in blood, privies in estate, or privies in law.

Verdict, not evidence against a stranger.

The general rule is, that a verdict cannot be evidence for either party, in an action against one who was a stranger to the former proceeding, who had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment. Thus a verdict in an action between A. and B. is not evidence against a third person C., who was neither party nor privy to the first suit. The case of Green v. the New River Company (1), where Lord Kenyon said, that a verdict, obtained in an action against a person for the negligence of his servant, is evidence in a subsequent action by the master against the servant, as to the quantum of damages, is not an exception to the general rule. Such a verdict would not be evidence of the fact of the injury, but admissible only as evidence of special damages, to shew the amount of what the master was by process of law compelled to pay in the action brought against himself.

Nor, for a stranger.

It is laid down also, as a general rule, that a verdict is not evidence for a stranger, against one who was party to the former suit. Thus, it was resolved by Ch. J. Holt and the other Judges of the Court, on a trial at bar, that no record of conviction or verdict can be given in evidence, but such whereof the benefit may be mutual, that is, such as might have been given in evidence either by the plaintiff or the defendant. (2) And Ch. B. Gilbert lays it down, "that no body can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary." (3) The same rule applies to depositions as well as to verdicts. Thus, if A. prefers his bill against B., and B. exhibits his bill against A. and C. in relation to the same matter, and a trial at law is directed, C. cannot give in evidence the depositions in the

(1) 4 T. R. 590. And see 2 East, 459.

(2) R. v. Warden of the Fleet, Rep. temp. Holt, 134. Bull. N. P. 233. S. P.

(3) Gilb. Ev. 28. Bull. N. P. 232. The same principle is adopted by Eyre C. J. in his judgment in the Duchess of Kingston's case, 11 St. Tr. 261.

cause between A. and B., but the trial must be entirely as of a new cause. (1)

The reason why a verdict is not evidence against a person, who was neither a party to the former suit, nor claims under one of the parties, is because he had no opportunity of calling witnesses, or cross-examining those on the other side, nor of appealing against the judgment. And the reason, why the verdict would not be evidence for a stranger, even against a party who was engaged in the former suit, seems to be, because, if he had been party to that suit instead of the person who gained the verdict, the result might have been different; for as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict. Under such circumstances to admit a verdict as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from availing himself of directly in his own suit. But this reason, it is evident, only applies, where the verdict is offered in evidence by a third person, against the party who failed in the former action, and not where it is produced against the party who succeeded.

Exceptions to the rule.

There are several exceptions to the general rule, which requires, that verdicts or judgments should be admitted in evidence only between the original parties to the suit, or their privies.

1. Verdict, as to customs, tolls, &c.

1. On a question of custom, or toll, a verdict is evidence, although between other parties (2); for the custom or toll is lex loci, and it is as reasonable to give in evidence a verdict between other parties, as to prove a payment of the duty by strangers. So on a question of customary right of common (3),

(1) Rushworth v. Countess of Pembroke and Currier, Hardr. 472.

(2) City of London v. Clarke, Carth. 181. Bull. N. P. 233.

(3) 1 East, 357. 5 T. R. 413. n.

or a public right of way (1), or on the liability to repair a highway (2), or on manorial or other customs (3), or on the public right of election to a parochial office (4), a verdict in a former action between any other persons is admissible in evidence. The common reputation of the place would be evidence of the right; à fortiori, the finding of twelve men upon their oaths is evidence. (5) On such questions, therefore, a verdict in an action between A. and B. is evidence of the point there directly determined, in an action between C. and D., where the same point comes in issue; but it is clearly not conclusive. (6) And it seems not to be conclusive evidence for or against A. or B., in an action between either of them and a third person C. (7); it could not be pleaded, in such a case, by way of estoppel. Another exception to the general rule, says Mr. Justice Buller, is in a question of pedigree, where a special verdict between other parties, finding a pedigree, would be evidence to prove a descent. (8) "Of this opinion," he adds, "was Mr. Justice Wright, in the Duke of Athol's case, which opinion is generally approved, though the determination of the rest of the Court was contrary." The other Judges considered the special verdict "inadmissible, as res inter alios acta, and, for any thing they knew to the contrary, the same evidence, that was laid before the former jury, might have been then produced." (9)

2. Judgments of courts of exclusive jurisdiction.

2. A judgment *in rem* in the Exchequer is conclusive as to all the world. (10) The sentence of a Court of Admiralty is equally conclusive upon all persons. So is the sentence of ecclesiastical courts in some few particular instances, in which

(1) Reed v. Jackson, 1 East, 355.
(2) R. v. St. Pancras, Peake, N. P. C. 219.
(3) By Holt C. J., Carth. 181. Case of the Manchester Mills, cited in Cort v. Birkbeck, 1 Doug. 222. n. (13.)
(4) Berry v. Banner, Peake, N. P. C. 156.
(5) By Lawrence J., 1 East, 357. Gilb. Ev. 31. See Freeman v. Phillipps, supra, p. 251.
(6) Biddulph v. Ather, 2 Wils. 23.
(7) See the cases above cited, and see Mayor of Hull v. Horner, Cowp. 111. ad fin.
(8) Bull. N. P. 233.
(9) Neal d. Duke of Athol v. Wilding and another, 2 Str. 1151.
(10) See infra, c. 3. s. 3. And see R. v. Hebden, supra, p. 318.

they have an exclusive jurisdiction. This subject will be fully considered in a subsequent section.

3. Judgment of q. sess. in appeals.

3. A judgment by the court of quarter sessions, discharging an order of removal, (not for defect of form, but upon the merits,) is conclusive as between the contending parishes, that the settlement of the pauper was not in the appellant parish at the time of the removal (1); but it is binding only on these parishes, not on a third parish. An order of removal executed, and not appealed against, is conclusive of the pauper's settlement at the time of the order, even as between third parishes, who were not parties to that order. (2) And a judgment by the quarter sessions, confirming an order of removal, is conclusive upon the appellant parish as to all the world, and may be given in evidence against them by a third parish on any subsequent appeal. (3) Here, it may be observed, the party, against whom the judgment was pronounced, had an opportunity of discharging themselves by proving the liability on a third parish; and this not having been done, and the court of quarter sessions having confirmed the order of removal, the last settlement is adjudged to be in the appellant parish; and this point being once determined, the judgment must be final, that there may be some end to litigation. (4)

4. Convictions.

4. A record of conviction on an indictment against a parish, for not repairing a road, has been held to be conclusive evidence of the liability of that parish to repair, on a plea of not guilty to a second indictment. (5) If the parish can shew, that fraud has been practised in obtaining the former verdict, this would vitiate the judgment; otherwise, it is said to be conclusive. Fraud, as it has been observed (6), is only put for an example. If the parish consists of several districts, which have immemorially repaired the respective highways

(1) R. v. Sarratt, Burr, S. C. 73. Harrow v. Rislip, Salk. 524.

(2) R. v. Kennelworth, 2 T. R. 598. R. v. Corsham, 11 East, 388.

(3) Admitted, R. v. Rislip, 2 Bott, 700. R. v. Bentley, 2 Bott, 704. R. v. Sarrat, 2 Bott, 702.

(4) By Holt C. J. in R. v. Rislip, 2 Salk. 524. 2 Bott, 705.

(5) R. v. St. Pancras, Peake, N. P. C. 219., by Lord Kenyon.

(6) 2 Saund. 159. *a.* note by the editor.

lying within them, and if the districts, in which the road indicted is not situate, can shew that they had no notice of the former indictment, (the defence having been made and conducted entirely by the district within which the road lies,) the Court will consider the indictment as being substantially against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in the parish. (1)

Criminal proceedings, on which a person has been attainted, are between the king and the party only, but they are evidence, as was before mentioned, to prove the attainder between all parties, and on all occasions. A conviction and judgment prove the incompetency of a witness; the reversal of the judgment on writ of error restores his competency. (2) So a record of conviction for felony is admissible in evidence against an accessory, to shew that the felony has been committed by the person convicted, as principal. (3) These facts the conviction of the principal has established with certainty, at least sufficient to put the accessory to his answer. The rule is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. Another weighty reason, says Mr. Justice Foster, is, that the witnesses against the principal may be dead, or not to be found, when the accessory is brought upon his trial, especially after a long interval between the trials. It is admitted, however, that the record of conviction is not conclusive evidence against the accessory, because it is as to him res inter alios acta.

5. A judgment is evidence, in many cases, for or against parties who were strangers to the former suit, when offered as proof of a collateral fact, by way of inducement to the ac- 5. Judgment evidence, by way of inducement.

(1) R. v. Townsend, 1 Doug. 421. R. v. Eardisland, 2 Campb. 494.

(2) See ante, p. 34. Lord Lovat's case.

(3) Fost. Disc. iii. c. 2. s. 2. p. 364, 365. 367. R. v. Smith, 1 Leach, Cr. C. 288. Though the judgment on the record is drawn up irregularly, and erroneous, proof of the conviction will be sufficient. R. v. Baldwin, 3 Campb. 265.

tion. Thus, where a party claims under an execution, the judgment in the former suit, under which the execution issued, is part of his title, and admissible in evidence, though the other party may be a stranger to that suit. And where the defendant is liable to pay the amount of damages, which a third person has recovered in a suit against the plaintiff, the verdict in that suit will be evidence to prove the amount. (1) So, in an action of debt between A. and B., for rent due from a certain day, it has been held that a judgment in an action of replevin between B. and C., (in which C. made cognizance as bailiff of A., and one of the issues found against B. in that action was, that he held the premises at the time of the distress as assignee of the original tenant, a bankrupt,) is evidence, and conclusive evidence, of B.'s tenancy; if he had joined issue on this point with a mere stranger, the judgment would have the same conclusive effect. (2) So, where, in an action of assumpsit for goods sold and delivered against two defendants, (one of whom suffered judgment by default, and the other defended,) the question at the trial was, whether the defendants were partners at the time when the goods had been delivered, Lord Kenyon held, that a verdict on an issue, directed by the Court of Exchequer to try the fact of partnership, was conclusive evidence of a subsisting partnership, and that it could not properly be deemed res inter alios acta, as both the defendants had been the parties on record in that suit, and it was open to either of them by any evidence to rebut the idea of a partnership. (3)

(1) On this account the defendant would not have been a competent witness in the former suit. See Green v. N. R. Comp. supra, 54. and other cases there cited.

(2) Hancock v. Welch and Cooper, 1 Starkie, 347.

(3) Whateley v. Menheim and Levy, 2 Esp. N. P. C. 608. And see Lowfield v. Bencroft, Bull. N P 40. 2 New Rep. 371.

Sect. II.

Of Judgments, with reference to the Subject-matter of the Suit.

General rule.

The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, upon the same matter directly in question in another court. (1) And it is a bar to any other action of the same nature as the first. (2) By actions of the same nature is meant actions in a similar degree; not merely those, which have a similitude of form. All personal actions are of the same degree; therefore each is a perpetual bar. (3) Thus, a judgment in an action of debt is a bar in assumpsit on the same contract. (4) And a judgment in trespass, when the right of property is determined, will be a bar in trover for the same taking. (5) So, a verdict for the defendant in trover is a bar in an action for money had and received, for the money arising from the sale of the same goods. (6) One great criterion for trying, whether the matter or cause of action be the same, is that the same evidence will maintain both the actions. But where the plaintiff failed in his first suit on account of some defect in pleading, or from having mistaken the form of action, the judgment will not be conclusive, and he may bring another action to try the same right (7)

Judgment conclusive only as to subject-matter.

If the plaintiff on the trial of his action attempted to prove a demand against the defendant, and failed in the attempt, he cannot set it up again in a second action. But if he omitted to give any evidence of the demand on the former occasion, though he had an opportunity of doing so. he is not precluded from doing it afterwards. Thus, when the plaintiff

(1) See ante, p. 313.

(2) Ferrer's case, 6 Rep. 7.; Cro. El. 667. S. C. Sparry's case, 5 Rep. 61. Hitchin v. Campbell, 2 Black. 827. 831.

(3) 2 Black. 831.

(4) Slade's case, 4 Rep. 94. Com. Dig. tit. Action, (K 3.)

(5) Com. Dig. Ib. Putt v. Roster, 2 Mod. 319. 3 Mod. 1. S. C. Sir T. Raym. 472. S. C. 2 Black. Rep. 831.

(6) Hitchin v. Campbell, 2 Black. 827.

(7) Robinson's case, 5 Rep. 33. 6 Rep. 8. a. Com. Dig. tit. Action, (L 4.) 2 Black. 831.

in a former action declared on a promissory note and for goods sold, but, upon executing a writ of enquiry after judgment by default, gave no evidence on the count for goods sold, the judgment was not a bar to his recovering for the goods in another action. (1) So, it has been held, that an award, made on a reference of all matters in difference between the parties, is no bar to any cause of action, which the plaintiff had against the defendant at the time of the reference, if it appear that the subject-matter of the action was not inquired into before the arbitrator. (2)

In considering the effect of a former judgment, it is to be observed that the judgment, whether it be pleaded in bar, or given in evidence where special pleading is not required, can be final only for its own proper purpose and object, with reference to the subject-matter of the suit, and upon the points there put in issue and directly determined. Therefore, in an action for obstructing a watercourse, where a verdict for the plaintiff in a former action, which had been brought against the defendant for another obstruction to the same watercourse, was offered in evidence under the general issue, Lord Mansfield held that the plaintiff had not obtained such a determination of his right by the former verdict, as the law considered conclusive. (3) And this decision has been recognized and confirmed in a very elaborate judgment, before referred to on the nature of estoppels. (4)

There is a difference, it has been said, between real actions and personal actions, as to the conclusiveness of a judgment. "In a personal action, as debt, account, &c. the bar is perpetual; for the plaintiff cannot have an action of a higher nature, and has no remedy but by error or attaint. (5) But if the plaintiff be barred in a real action by judgment on a verdict, demurrer,

(1) Seddon v. Tutop, 6 T. R. 607. And see Cross v. Salter, 3 T. R. 639.

(2) Ravee v. Farmer, 4 T. R. 146. Martin v. Thornton, 4 Esp. N. P. C. 180.

(3) Sir F. Evelyn v. Haynes, cited in Outram v. Morewood, 3 East, 365. Sintzenick v. Lucas, 1 Esp. 43.

(4) By Ld. Ellenborough in Outram v. Morewood, ib.

(5) 1st Res. Ferrer's case, 6 Rep. 7.

confession, &c. yet he may have an action of a higher nature, and try the same right again; because it concerns the freehold and inheritance." (1) Now, although it is true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand, as far as that former judgment purports to bind, and against all such persons as it is competent by law to bind. A judgment is final for its own proper purpose and object, and no further. A recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject-matter. Thus, a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession. (2)

Judgment in ejectment.

A judgment in one action of ejectment is not conclusive in another, in consequence of the fictitious nature of the proceedings. However, it is conclusive evidence of the plaintiff's title against the tenant in possession, in an action for mesne profits; for the plaintiff, to entitle himself to recover in an ejectment, must shew a possessory right not barred by the statute of limitations. This judgment, like all others, only concludes the parties as to the subject-matter. It proves nothing beyond the time laid in the demise; because beyond that time the plaintiff has alleged no title, nor could be put to prove any. As to the length of time also, during which the tenant has occupied, or as to the value, the judgment proves nothing, for the same reason. (3)

(1) See the judgment in Outram v. Morewood, 3 East, 359.

(2) Ib. 354.

(3) Aslin v. Parkin, 2 Burr. 668. See Hunter v. Britts, 3 Campb. 455, as to the effect of a judgment against the casual ejector.

Sect. III.

Of the Admissibility, in Civil Cases, of Verdicts in Criminal Proceedings.

A question has frequently arisen, whether verdicts, which have been given in criminal proceedings, can be admitted as evidence in civil cases. The principal cases on this subject are the following: —

1. Sentence in Ecclesiastical Court.

1. In the case of Hillyard and Grantham (1), which was an issue directed by the Court of Chancery to try a question of legitimacy, a sentence against the supposed father and mother upon a proceeding against them in the Consistory Court of Lincoln, for living together in fornication, was offered in evidence to prove that they were not married; but the whole Court of King's Bench were of opinion on a trial at bar, that the sentence could not be given in evidence; "because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, because it was res inter alios acta, and could not affect the issue: but they held, that if it had been a sentence on the point of marriage in a question on the lawfulness of the marriage, it might have been given in evidence, being the sentence of a court having proper jurisdiction."

2. Record of conviction.

2. In the case of Gibson v. Maccarty (2), on an issue to try the genuineness of some promissory notes, depositions of a deceased witness having been read on the part of the plaintiff, (in which depositions the witness swore, that the defendant had acknowledged the notes in question and also another note,) it was proposed, on the part of the defendant, to shew by a record of conviction, that the plaintiff had since been convicted of forging this other note, mentioned by the deponent; for such evidence, it was said, would go to the credit of the deponent's evidence, as to the acknowledgment of the notes

(1) Cited by Lord Hardwicke in Brownsord v. Edwards, 2 Ves. 246. and in Rep. temp. Hard. 311

(2) Rep. temp. Hard. 311. And see supra, p. 322, 323.

in question; and, secondly, because there is at all times a liberty given to examine into the plaintiff's character. But this evidence was opposed on the part of the plaintiff, on the ground, that no record of a criminal action can be given in evidence in a civil suit, because such a conviction might have been upon the evidence of a party interested in the civil action, and Lord Hardwicke is reported to have said, "that the general rule was as had been stated by the plaintiff's counsel (1), and that it had been so strictly kept, that in the case of the Hillyards, on a question of legitimacy, the Court refused to admit a sentence of excommunication in the spiritual court, for fornication between the father and mother of the party, whose legitimacy was impeached."

3. Coroner's inquest.

3. In a third case (2) to be found on this subject, upon an issue to try the question of devise or no devise, a coroner's inquest, finding the deceased a lunatic, was offered in evidence against the plaintiff, who claimed as executrix, for the purpose of shewing, that the deceased was incompetent to make a will; this evidence was objected to on the part of the plaintiff, and the court were equally divided in opinion. The Chief Justice (Parker) was of opinion that the inquest ought to be admitted, "because it was for the plaintiff's advantage, as the personal estate would be saved by the finding of lunacy," and he added that in Lord Derby's case an inquest post mortem was allowed to be given in evidence. Mr. Justice Powys agreed with the Chief Justice. Mr. Justice Eyre said, "This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment for battery cannot be read in an action for the same battery. An inquest post mortem is in the nature of a civil proceeding, but this is criminal, for it might induce a forfeiture of the goods, if he had been found felo de se." And Mr. Justice Pratt said, "If a verdict be given in evidence, it must be between the same parties, and, therefore, an

(1) Acc. by Sir J. Mansfield C. J. in Hathaway v. Barrow and others, 1 Campb. 151.

(2) Jones v. White, Tr. at bar, 1 Str. 68. As to Inquisitions, see post. ch. 4. sect. 2.

indictment at the suit of the king cannot be read in an action at the suit of the party."

The objections, then, against the admissibility of such evidence, seem to be, first, that the parties are not the same in the civil suit as in the criminal case; and secondly, that the party in the civil suit, on whose behalf the evidence is supposed to be offered, might have been a witness on the prosecution. On the other hand, it may be said, that, although the prosecution was conducted in the name of the king, no kind of injustice can be done to the defendant in admitting the record of conviction as evidence against him on the points there in issue, since he had a full opportunity at the trial of defending himself, and, if he could, of disproving the charge: and with regard to the second objection, it cannot at least apply to cases where the party, who offers the judgment in evidence, was not in fact a witness on the prosecution, or where from the nature of the case he could not have been admitted.

Record of conviction.

A record of conviction is conclusive proof, that the person charged has been convicted. It is conclusive also of his incompetency as a witness in a court of justice, while the judgment stands in force against him. Mr. Justice Buller lays down the rule generally (1), "that a conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it afterwards come collaterally in controversy in courts of civil jurisdiction. As, suppose the father convicted on an indictment for having two wives, this, he says, would be conclusive evidence in an action of ejectment, where the validity of the second marriage is in dispute." * And if a person,

(1) Bull. N. P. 245. 2 Atk. 412.

* In support of this, the case of Boyle v. Boyle (a) is cited; where a woman, who was libelled in the spiritual court in a cause of jactitation of marriage, applied to the Court of King's Bench for a prohibition, suggesting

(a) 3 Mod. 164. Comberb. 72. S. C.

indicted for an assault, plead guilty to the charge, the record would be conclusive against him in an action for damages for the same assault. (1)

If the rule is, as Mr. Justice Buller has laid down, that a record of conviction may be given in evidence, on the same matter in a civil suit, it must be understood at least with this limitation, that the party, who offers such evidence, was not a witness on the prosecution. To admit the record as evidence on any other condition, would be in effect to allow the party to a suit to give evidence for himself. The record, in such a case, seems upon every principle inadmissible; and the rule must be the same, whether the conviction was founded solely on his testimony, or whether his testimony was corroborated by other evidence. Thus, on a trial for perjury committed in an answer to a bill of injunction, the person who was sued by the defendant in an action then pending, and who in consequence filed the bill, was thought to be a competent witness (2), on the ground that a conviction, procured by his testimony, could not be used by him for obtaining relief in equity against the defendant's action at law. (3) So a conviction for an assault before a magistrate, on the information of the injured party, is not evidence in an action for the same assault. (4) Ch. B. Gilbert seems indeed to have been of opinion, that, where the verdict in the criminal prosecution is supported by other testimony, besides that of the party who wishes to avail himself of

(1) Lamb. Just. B. 2. c. 9. p. 427. cites 9 H. 6. 60. and 11 H. 4. 65.

(2) R. v. Boston, 4 East, 581. Burdon v. Browning, 1 Taunt. 521.

(3) Bartlett v. Pickersgill, 4 East, 577. n. (*b*).

(4) Smith v. Rummens, 1 Campb. 9. Hathaway v. Barrow and others, 1 Campb. 151. Burdon v. Browning, 1 Taunt. 520.

that the complainant had been convicted of bigamy in marrying her; and the Court of King's Bench granted the prohibition. The best report of this case is in Comberbach, whence it appears that Holloway C. J. and Allibone J. granted the prohibition against the opinion of Powell J., "because," they said, "the libel is for jactitation, and the ecclesiastical court will not allow the plea." Nothing further is to be found in the case, to support the general position laid down by Mr. Justice Buller.

it in the civil suit, there the verdict may be properly received in evidence: for though the verdict, he says, "may be diminished in point of authority, by shewing that it was partly founded on the oath of the party interested in the action, yet the jury ought to respect it no farther than as they presume it was given and supported by other witnesses not concerned in the cause." (1) It may still, however, be objected, that the fact might have found credit from the party's oath, and since this evidence is so intermixed, that it cannot appear on what the jury relied, the verdict ought not to be admitted at all as evidence.

Record of acquittal.

Though a conviction, says Mr. Justice Buller, in a court of criminal jurisdiction is conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet an acquittal, which does not, like a conviction, ascertain facts, is no proof of the reverse. (2) It is, however, conclusive, that the party has been tried for the offence, and was not proved to be guilty.

(1) Gilb. Ev. 26.

(2) Bull. N. P. 245. Gilb. Ev. 32. A verdict of not guilty, on an indictment against a parish for not repairing a road, is said not to be evidence for the parish on a second indictment, R. v. St. Pancras, Peake, N. P. C. 219. As to acquittals in the Exchequer, see infra, c. 3. s. 3. ad fin.

CHAP. III.

Of the Judgments of Courts of exclusive Jurisdiction.

THE great principle on this subject is, that a judgment of a court of exclusive jurisdiction directly upon the point is conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose: but that the judgment either of a court of concurrent or exclusive jurisdiction is not evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. (1)

(1) 11 St. Tr. 261. Judgment of Ch. J. De Grey in Duchess of Kingston's case.

But although such sentences are conclusive, and cannot be impeached from within, yet, like all other acts of the highest judicial authority, they are impeachable from without. (1) Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it vitiates all judicial acts, whether ecclesiastical or temporal. (2)

In treating of this subject, it is proposed to consider,

1. Sentences of Ecclesiastical Courts: 2. Sentences of Courts of Admiralty, and of Foreign Courts: 3. Judgments in rem in the Exchequer, and by Commissioners of Excise: 4. Sentences by a College in one of the Universities, and Convictions before Magistrates.

Sect. I.

Of Sentences in the Ecclesiastical Courts.

Sentence on question of marriage.

Spiritual courts have the sole and exclusive cognizance of questioning or deciding directly the legality of marriage. And the temporal courts have an inherent power of deciding incidentally, as far as temporal rights are concerned, either upon the fact or legality of a marriage, when they form a part of some more general issue within their cognizance, or are in some way connected with the decision of the proper object of their jurisdiction. But where, in civil causes, the temporal courts find the question of marriage directly determined by the ecclesiastical court, they receive the sentence as conclusive proof of the fact, it being an authority accredited in a judicial proceeding by a court of competent jurisdiction. (3) They receive it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. A sentence of nullity, therefore, and a sentence in affirmance of marriage, have been received as conclusive evidence on a

(1) 11 St. Tr. 262.

(2) Fermor's case, 3 Co. Rep. 78. *b*.

(3) Judgment of De Grey C. J. 11 St. Tr. 261. Bunting's case, 4 Co. Rep. 29. Kenn's case, 7 Co. Rep. 42. Jones v. Bow, Carth. 225. Da Costa v. Villa Real, 2 Str. 960.

question of legitimacy arising incidentally upon a claim to a real estate.(1) So, a sentence in a cause of jactitation has been received as evidence against a marriage, upon a title in ejectment, and in personal actions immediately founded on a supposed marriage.(1) In all these cases, said C. J. De Grey, the parties to the suit, or at least the parties, against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties and had acquiesced.

The sentences of the spiritual courts are, in general, not evidence, except against the parties to the suit, in which the judgment was given, or against those claiming under them. To make them conclusive against strangers, would be giving them an effect beyond what a judgment in the courts of common law is allowed to have. In a few particular instances, indeed, namely, where issue is joined on the record in certain real writs, on the legality of marriage or its immediate consequence, general bastardy, or on the fact of profession, or deprivation, n those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned and entered on record in the temporal courts, is a perpetual and conclusive evidence against all the world on that point; which exceptionable extent was the occasion of a statute in the reign of Henry the Sixth, requiring certain public proclamations to be made, for persons interested to come in and be parties to the proceeding.(2)

A sentence in a cause of jactitation is evidence against a marriage, and has been received as such, upon a title in ejectment, and in personal actions immediately founded upon a supposed marriage(3); but it will not, like a sentence of nullity, be conclusive evidence. They are sentences of a very different nature and operation. A cause of jactitation is ranked

(1) 11 St. Tr. 261.
(2) See the Judgment by De Grey C. J., 11 St. Tr. 261.
(3) 11 St. Tr. 261.

as a cause of defamation only, and not as a matrimonial cause, unless when the defendant pleads a marriage: and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, still the sentence has only a negative and qualified effect, namely, that the party has failed in his proof, and that the libellant is free from all matrimonial contract "as far as yet appears," leaving it open to new proofs of the same marriage in the same cause, or to any other proofs of that or any other marriage in another cause: and if such sentence is no plea to a new suit in the ecclesiastical court, and is not conclusive there, it cannot conclude another court, which receives the sentence, from going into new proofs to make out that or any other marriage. (1) Admitting the sentence in its full extent and import, it only proves that it did not yet appear that the parties were married, and not that they were not married at all; and, by the rule laid down by Ld. Ch. J. Holt (2), such sentence cannot be proof of any thing to be inferred by argument from it: and therefore it is not to be inferred, that there was no marriage at *any* time or place, because the court had not then sufficient evidence to prove a marriage at a *particular* time and place. In the Duchess of Kingston's case, therefore, on a charge of polygamy, where a sentence in the spiritual court in a cause of jactitation of marriage was offered as conclusive evidence to disprove the second marriage, the Judges held, that this sentence, (even admitting it to be evidence on a criminal prosecution,) could not be conclusive, but that the sentence and the judgment of the Lords might well stand together, and both propositions be true. The sentence would only prove, that it did not then appear that the parties were married; but, because the court had not then sufficient proof of the marriage specified, it could not be inferred, that there was no marriage between them at any other time or place.

The ecclesiastical courts have also exclusive authority in deciding on the validity of wills of things personal, and in **Probates, and letters of administration.**

(1) 11 St. Tr. 261. (2) Blackham's case, 1 Salk. 290.

granting administration. (1) And their sentences, pronounced in the exercise of this sole and exclusive jurisdiction, are so binding on the temporal courts, as to be conclusive evidence of the right directly determined. Thus a probate unrepealed is conclusive evidence, in civil cases, of the validity of such will: and therefore payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null and void. (2) A probate is the only legitimate evidence of personal property being vested in an executor, or of the executor's appointment; the original will is not admissible for that purpose. (3) But the sentence of an ecclesiastical court is evidence only of the point directly determined; it will not be evidence of any collateral matter, which may possibly be collected or inferred from the sentence by argument. (4)

The adverse party may shew that the probate is forged, because such evidence supposes, that the spiritual court has given no judgment; or, if the probate was granted by an inferior court, that the testator left bona notabilia, for then the court had not jurisdiction. (5) But evidence will not be admitted to prove, that another person was appointed executor, or that the testator was insane (6): that would be to falsify the proceedings of the ordinary in cases where he is exclusive judge. The probate of a will, devising real property, is not evidence of the contents of the will (7), even though the original is proved to be lost (8); the spiritual court having no power to authenticate such a devise, as far as it relates to land.

It appears, then, that the sentence of an ecclesiastical court directly upon a point within its peculiar jurisdiction, is conclusive on the same matter coming incidentally into question

(1) Noel v. Wells, 1 Lev. 235. 1 Ld. Ray. 262. 3 T. R. 130.
(2) Allen v. Dundas, 3 T. R. 125.
(3) Coe v. Westernham, 2 Selw. N. P. 730.
(4) Blackham's case, 1 Salk. 290. Thompson v. Donaldson, 3 Esp. N. P. C. 63. See ante, p. 332.
(5) 1 Sid. 359. Bull. N. P. 247. 5 Rep. 30.
(6) 1 Lev. 236.
(7) Bull. N. P. 245.
(8) Doe d. Ash v. Calvert, 2 Campb. 389. Hoe v. Nathrop, 1 Ld. Ray. 154. St. Leger v. Adams, ib. 731. Dike v. Polhill, ib. 744.

in a civil case in another court. But although the law is thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration (1); first, because the parties are not the same, for the king, (in whom the trust of prosecuting public offences is vested, a trust executed by his immediate orders, or in his name by some prosecutor,) is not a party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, or in any manner intervene or appeal: secondly, such doctrine would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of common law, to which it solely and peculiarly belongs. The case of the King v. Vincent (2), therefore, (where the probate of a will is said to have been admitted as conclusive evidence of its validity, on an indictment for the forgery of the same will,) has been frequently much questioned, and at length expressly overruled. (3)

For the same reason, a sentence in a spiritual court on the question of marriage will not preclude enquiry on a criminal charge of polygamy; unless it is made to have such an effect by an express provision of the legislature. Now, by the statute of 1 J. 1. c. 11. which makes polygamy a felonious offence, and for the trial of this offence necessarily gives to the temporal courts a cognizance of the lawfulness of marriage, it is provided that the act "shall not extend to any persons divorced by a sentence in the ecclesiastical court, nor to any persons where the former marriage has been by the ecclesiastical court declared null and void." There are two cases, then, put by the statute, in which the sentence of the ecclesiastical court will protect against the criminal enquiry, namely, the case of

(1) 11 St. Tr. 261.
(2) 1 Str. 481.
(3) R. v. Gibson, Lanc. Sum. Ass. 1802, before Ld. Ellenborough C. J. stated by Mr. Evans in the 2d vol. of his edition of Pothier, p. 356. R. v. Buttery and M'Namara, at the Old Bailey, May 6. 1818. S.P.

a sentence of divorce, and the case of a sentence of nullity of marriage. (1) But the statute makes no exception in favour of a sentence in a cause of jactitation: and as such a sentence is not conclusive even in the court where it was delivered, and declares not directly but only collaterally the invalidity of marriage, it has been adjudged not to be a bar to a criminal prosecution. (2)

Sentence impeachable for fraud.

It has been before mentioned, that judgments and sentences of courts of justice, or any other judicial act, may be impeached by evidence of fraud or collusion. And such evidence was adjudged to be admissible, on the part of the prosecution, in the case of the Duchess of Kingston, who was tried for polygamy. A distinction, in this respect, has been made between the case of a stranger, (who cannot come in and reverse the judgment, and therefore of necessity he must be permitted to aver, that it was fraudulent,) and the case of a party to the proceedings; the party himself cannot give evidence of fraud, but must apply to the Court, which pronounced the judgment, to vacate it. Thus, in the case Prudham v. Phillips (3), where the defendant proved her marriage with one M., in answer to which a sentence of an ecclesiastical court was produced, (to which sentence she was a party,) shewing that she was at the time married to another person, Chief Justice Willes, after much debate, refused to allow the defendant to prove, that the sentence had been obtained by fraud.

Sect. II.

Of Sentences in Courts of Admiralty and Foreign Courts.

Sentence in questions of prize.

The Judge of the Admiralty has the sole and exclusive cognizance in questions of prize or not prize at sea. (4) The

(1) 1 East P. C. 467.

(2) Duchess of Kingston's case, 11 St. Tr. 260.

(3) Ambler, 763. cited by the Ld. Ch. from a MS. note of Serjt. Parker.

(4) Thompson v Smith, 1 Sid. 320. Brown v. Franklyn, Carth. 476. Le Caux v. Eden, 2 Doug. 600. Lindo v. Rodney, n. (1), ib.

true reason of this rule is, that prizes are acquisitions jure belli, and the jus belli is to be determined by the law of nations, and not by the particular municipal law of any country. A sentence therefore in the prize-court, deciding the question of prize, is conclusive, in all it professes to decide, on the same point incidentally arising in courts of common law. "It has been clearly settled," said the Master of the Rolls in the case of Kindersley against Chase (1), "from the time of Lord Hale down to the present period, that a sentence of condemnation in a court of admiralty is conclusive, when it proceeds on the ground of enemy's property, that the property belongs to enemies, and not only for the immediate purpose of such a sentence, but is binding on all courts and against all persons. The sentence of a court of admiralty, proceeding in rem, must bind all parties, must bind all the world."

Sentence of foreign court of admiralty.

The sentence of a foreign court of admiralty also, which is acknowleged by the law of nations and of competent jurisdiction, deciding the question of property, is conclusive, if the same question arise in this country. (2)* And though in the case of Hughes and Cornelius, the leading case on this subject, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute, yet, from that period down to the present, the doctrine there laid down has been considered as applicable to questions of warranty in actions on policies, as to questions of property in actions of trover. (3) And it may now be as-

(1) Cockpit, July 1801, Park. Insur. 490.

(2) Hughes v. Cornelius, 2 Show. Rep. 232. Sir T. Ray. 473. S. C. Bernardi v. Motteux, 2 Doug. Rep. 575.

(3) By Chambre J., Lothian v. Henderson, 3 Bos. & Pull. 513.

* This principle, which is established in our courts of justice, prevails also in those of the United States of America. See 4th Vol. of Cranch's Reports of cases adjudged by the Supreme Court of the United States, pp. 267. 271. 512, 513.

sumed as the settled doctrine of courts of English law, that all sentences of foreign courts, of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of insurance, on every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially. (1) " It is now too late, said Mr. Justice Lawrence (2), to examine the practice of admitting these sentences to the extent to which they have been received, supposing that practice might at first have appeared doubtful. On the authority of those decisions men have acted for a long series of years, and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the questions, arising out of such contracts, to which the decisions are applicable, will be ruled by them." Such a sentence of condemnation will be binding on the rights of third persons, as well as on the parties to the original suit; it is conclusive between the assured and the underwriter, with respect to every fact, which it professes to decide. Thus, when it proceeds on the ground of enemy's property, it is conclusive, that the property belongs to enemies, not only for the immediate purpose of such a sentence, but it is binding on all courts and as against all persons. (3) And the sentence is binding, whether it proceed to condemn the ship expressly as being enemy's property, or whether such a ground of decision can only be collected from other parts of the proceedings: and this, although it appear on the face of the sentence, that the prize-court arrived at the conclusion through the medium of rules of evidence and rules of presumption, established only by the particular ordinances of their own country, and not admissible on general principles. (4)

Effect of sentence. The sentence is conclusive evidence of the points, upon

(1) Bolton v. Gladstone, 5 East, 160. Christie v. Secretan, 8 T. R. 196. Kindersley v. Chase, Park, Ins. 486.

(2) Lothian v. Henderson, 3 Bos. & Pull. 524. Baring v. Clagett, 3 Bos. & Pull. 214. See 1 Campb. 432.

(3) Kindersley v. Chase, Park, Ins. 490. All the cases on this subject are there collected.

(4) Bolton v. Gladstone, 5 East, 155. 2 Taunt. 85. Baring v. Roy. Ex. Ass. Comp. 5 East, 99.

which it professes to decide. (1) Thus, for example, if it proceeded upon the ground of the property not being neutral, it is conclusive against the insured, that he has not complied with his warranty. (2) If no special ground is stated, and the ship is condemned generally as lawful prize, it is to be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy; and the sentence, in such a case, has been held to be conclusive evidence, that the property was not neutral. (3) In the case of Bernardi v. Motteux (4), where there was some ambiguity in the sentence, so that the precise ground of the determination could not be collected, the Court of King's Bench considered themselves at liberty to examine, whether the ground, on which the sentence proceeded, but which was not stated, actually falsified the warranty contained in the policy. Hence it follows, that it does not lie on the party, who produces the sentence, to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the sentence, to shew that it proceeded on some other ground. (5)

Where the sentence professes to be made on particular grounds, which are set forth in the sentence, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts. (6) Or if the sentence has not decided the question of property, nor declared whether it be neutral, but condemned the property as prize, solely on the ground that the ship had violated an *ex parte* ordinance, to which the neutral country had not assented, or on the ground of a foreign ordinance against the law of nations, such a sentence, though conclusive of the question of prize or no prize, would not be conclusive of the fact, whether or not the ship

(1) Christie v. Secretan., 8 T. R. 196. Fisher v. Ogle, 1 Campb. 418. Everth v. Hannam, 2 Marshall, 72. Marshall v. Parker, 2 Campb. 70. See ante, p. 340.

(2) Barzillay v. Lewis, Park, Insur. 469. Baring v. Clagett, 3 Bos. & Pull. 201.

(3) Saloucci v. Woodmass, Park, Ins. 471. 8 T. R. 444.

(4) 2 Doug. 574. 3 Bos. & Pull. 215.

(5) Kindersley v. Chase, Park, 490.

(6) Calvert v. Bovil, 7 T. R. 523. 8 T. R. 411.

were neutral. (1) Lastly, sentences of condemnation in foreign courts of prize are admissible, only where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country, or in the country of a co-belligerent or ally in the war. (2) It has, therefore, been determined, that a sentence pronounced by the authority of the capturing power, within the dominions of a neutral country, to which the prize may have been taken, is illegal (3), and consequently would not be admissible evidence to falsify the warranty of neutrality.

Sentence of other foreign courts.

The sentence of any other foreign court of competent jurisdiction, directly deciding a question which was properly cognizable by the law of the country, seems to be conclusive here, if the same question arise incidentally between the same parties in this country. Thus the sentence of a foreign court of competent jurisdiction, directly establishing a marriage in that country, would be conclusive in any of our courts on the validity of the marriage. (4) So, where a party, having accepted a bill of exchange drawn upon him at Leghorn, instituted a suit there, in which suit his acceptance was vacated, and upon his return to this country being sued again on his acceptance, applied to the Court of Chancery for an injunction and relief against the second action, Lord Chancellor King decided, that the cause was to be determined by the law of the country where the bill was negotiated, and, as the acceptance had been there declared void by a competent jurisdiction, he thought the sentence must here also be conclusive. (5) So on a criminal charge, as for murder committed in a foreign country, an acquittal in that country might be pleaded here in bar to an indictment for the same offence (6); because, says Mr. Justice Buller, a final deter-

(1) Pollard v. Bell, 8 T. R. 444. Bird v. Appleton, 8 T. R. 562. Baring v. Clagett, 3 Bos. & Pull. 215. Bolton v. Gladstone, 2 Taunt. 85. 95. See 2 Campb. 154.

(2) Oddy v. Bovil, 2 East, 473.

(3) Havelock v. Rockwood, 8 T.R. 268. Case of the Flad Oyen, 8 T. R. 270. n. (*a*); 1 Rob. Adm. Rep. 155. Donaldson v. Thompson, 1 Campb. 429.

(4) By Lord Hardwicke, in Roach v. Garvan, 1 Ves. 159.

(5) Burrows v. Jemino, 2 Str. 733.

(6) Hutchinson's case, cited 1 Show. Rep. 6.; also in 2 Str. 733.

mination in a court of competent jurisdiction is conclusive in all courts of concurrent jurisdiction. (1) From the two last cases the following principle seems to be properly deducible, namely, that a party, who has been once discharged from a criminal charge or from a legal demand by the sentence of a foreign court of competent jurisdiction, may protect himself by that sentence against any fresh suit or prosecution instituted here for the same cause.

Action on foreign judgment.

If an action is brought in this country, as an action of debt or assumpsit, directly upon a foreign judgment, the sentence has been considered primâ facie evidence of the debt, but not conclusive. Lord Kenyon, indeed, in the case of Galbraith v. Neville (2), which was an action of debt on a judgment in the supreme court of Jamaica, said, he entertained serious doubts concerning the doctrine laid down in the case of Walker v. Witter (3), that foreign judgments are not binding upon the parties here; and after referring to a case, which might seem to point against his opinion, he added, "that is not an authority for saying, that we can revise the judgments of the lowest courts in foreign countries, where they have competent jurisdiction." However, Mr. Justice Buller, in the same case, said, "The doctrine which was laid down in the case of Sinclair v. Fraser has always been considered the true line ever since, namely, that the foreign judgment shall be primâ facie evidence of the debt, and conclusive, till it be impeached by the other party." "As to actions of this sort," he continued, "see how far the Court would go, if what was said in the case of Walker v. Witter were departed from. It was there held, that the foreign judgment was only taken to be primâ facie evidence, that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record (4): but if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has

(1) Bull. N. P. 245. Roche's case, 1 Leach. Cr. C. 160.

(2) 1 Doug. Rep. 5. n. (2); and 5 East, 475. n. (*b*). S. C.

(3) 1 Doug. 1.

(4) Acc. Ld. Mansfield in Herbert v. Cook, Willes Rep. 37. n. (*a*).

never been considered as a record: it cannot be declared on as such, and a plea of nul tiel record in such a case is a mere nullity. How then can it have the same obligatory force? In short, the result is this; that it is primâ facie evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreements, namely, that it shall be considered as good, till it is impeached." And in the case of Philips v. Hunter (1), Eyre C. J. said, "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory to the extent, to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent, to which by our law sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as a consideration primâ facie sufficient to raise a promise. We examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by the law." It is now fully established, that a judgment in a foreign court is only primâ facie evidence of a debt, and has the force of a simple contract between the parties.

When it is said, that a foreign judgment is evidence of a debt, the rule must obviously be understood with this limitation, that nothing appears in the record of the proceedings, on which the judgment is founded, contrary to reason and justice. If the judgment, for example, should appear to have passed against a defendant, who does not appear to have been served with process, or to have had any opportunity of defending the action, such a judgment would not be enforced by courts of justice in this country. This point occurred in the case of Buchanan v. Rucker (2), where it appeared from the proceedings, that the summons had been served by nailing up a copy of the declar-

(1) 2 H. Black. 410, in error.

(2) 1 Campb. 63. 9 East, 192 S. C.

ation on the door of the court-house; and it was adjudged, that although such might be the practice abroad, it was a practice inconsistent with all principles of justice, and that the judgment therefore could not be made the ground of an action of assumpsit. It will be necessary, therefore, to prove that the party was duly summoned, or, if he is described in the proceedings as an absentee, that he had absented himself from the country. (1) With respect to the proof of his absence, that fact might perhaps be inferred from a return, of *non est inventus*, to the process issued against him, if it be proved that he had been in the country. (2)

Although the foreign judgment is only primâ facie evidence of a debt, for which the suit abroad was instituted, yet for many purposes it will be conclusive between the parties, according to the nature of the subject-matter, and the purposes to which the evidence is applied. Thus, where a covenant had been made by the defendant to indemnify the plaintiff from all debts due from a late partnership subsisting between the plaintiff, the defendant, and a third person, and from all suits on account of non-payment, proof on the part of the plaintiff, that proceedings had been instituted in a foreign court against the late partners, for the recovery of a partnership debt, and that a decree passed against them for want of an answer, (in consequence of which a sequestration issued against the estate of the plaintiff, and he was obliged to pay the debt,) is conclusive evidence, in an action on the covenant against the defendant, who was a party to the foreign suit, and who having notice ought to have appeared and made his defence; and the defendant is not at liberty to shew, that the proceedings are erroneous. (3)

(1) Buchanan v. Rucker, cit. p. 344. Cavan v. Stewart, 1 Stark. 525.

(2) By Lord Ellenborough, Cavan v. Stewart, 1 Stark. 525.

(3) Tarleton v. Tarleton, 4 Maule & Selw. 21. Molony v. Gibbons, 2 Campb. 502.

Sect. III.

Of Judgments in rem in the Exchequer, and by Commissioners of Excise.

Judgment of condemnation, in the exchequer.

A judgment of condemnation in the court of Exchequer, where proceedings in rem have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized. (1) The jurisdiction of the court of Exchequer in this case is not only competent, but sole and exclusive: and though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of his property, by the proclamations according to the course of the court, and by the writ of appraisement.

A record of condemnation, for adulterating spirits, is evidence between other parties; but a record of conviction for penalties, which is a proceeding *in personam* not *in rem*, is of a different nature, and subject to the same rules as other judicial proceedings. In an action, therefore, for the price of spirits, where the defence was that the spirits had been adulterated, such record of conviction has been held not to be admissible as proof of the adulteration. (2)

Condemnation by commissioners of excise.

Whether a condemnation by the commissioners of excise ought to have the same conclusive operation, as a judgment of condemnation in the court of Exchequer, has not been clearly settled. In the case of Henshaw v. Pleasance, which was an action of trespass, brought against a revenue officer, for seizing goods supposed to have been irregularly lodged and concealed, a sentence of condemnation by commissioners of excise was offered as conclusive evidence against the plaintiff; but Mr. Justice Blackstone, who tried the cause (3), re-

(1) Scott v. Shearman, 2 Black. Rep. 979. By Ld. Kenyon C. J. in Geyer v. Aguillar, 7 T. R. 696. Bull. N. P. 244.

(2) Hart v. M'Namara, 2 Starkie, 154. by Gibbs Ch. J.

(3) Lond. Sitt. 1778., 2 Black. Rep. 1174.

fused to admit it to that extent, directing the jury that such a sentence was evidence, but not, like a condemnation in the Exchequer, conclusive. On a motion afterwards for a new trial, upon this supposed misdirection, the Court of Common Pleas confirmed the Judge's opinion. "The reasons and authorities," it was said, "relied on in the case of Scott v. Shearman, and other cases of the same kind, extend only to condemnations in the Exchequer, which is the king's supreme court of revenue, but not to the inferior jurisdiction of the boards of excise and customs."

From the report of the case of Scott v. Shearman it appears (1), that the ground of Mr. Justice Blackstone's opinion was, "that implicit credit ought to be given to any judgment *in a court of record*, which has competent jurisdiction of the subject-matter, and that the jurisdiction of the Court of Exchequer was in such a case not only competent, but sole and exclusive." The opinions of C. J. De Grey and the other Judges are not reported. They agreed in thinking the judgment of condemnation in the Court of Exchequer conclusive evidence of the right of seizure, but it does not appear whether they thought it conclusive, on the ground of its being a judgment of a court of record. Nor is this reason stated as the ground of determination in any of the authorities referred to by Mr. Just. Blackstone. A different principle was certainly established in the case of the Duchess of Kingston (2), where De Grey C. J. in an elaborate judgment delivered the unanimous opinion of the Judges; and it is observable, that he pronounced this judgment within a year after the determination of the court in the case of Scott and Shearman. The principle, there established, is not confined to the judgments of courts of record, some of which are of a very inferior description, but extends equally to every court of competent or exclusive jurisdiction; and the examples cited by C. J. De Grey, in illustration of this principle, are all drawn from the proceedings in ecclesiastical courts, none of which are classed among courts of record. It seems therefore correct to infer,

(1) 2 Blac. Rep. 979. (2) 11 St. Tr. 261.

from the rule established in the Duchess of Kingston's case, as well as from analogy to several cases mentioned in the course of the present chapter, that a sentence of condemnation by commisioners of excise will be conclusive, on the right of seizure coming incidentally into question in any other court, in all cases where by act of parliament they have a sole or exclusive jurisdiction.

In support of this position, the following authorities may be cited. First, in an action of trover against commissioners of excise (1), for levying the plaintiff's goods by their warrant under statute 12 C. 2. c. 23., the point was, whether, after they had adjudged low wines to be strong wines perfectly made, their judgment could be drawn in question again, so as to make the officers chargeable. The Court gave judgment for the plaintiff, on the ground, that the defendants had exceeded their jurisdiction. Rainsford B. said, that the defendants might well enough have justified by virtue of an authority from the commissioners of excise, who are judges of the fact, and whose authority is not traversable by the plaintiff, and that the plaintiff here must have taken his remedy by appeal and no otherwise. But if the commissioners exceed their authority, and that appear to the Court, then their proceedings are coram non judice, and an action of trespass lies. But if that does not appear, it must be otherwise. Hale C. B., and the other judges present, argued to the same effect.

In another case, which was an action of trespass against commissioners of excise for taking the plaintiff's money (2), the defendants pleaded not guilty, and gave in evidence their warrant and a judgment against the plaintiff, on an information against him for an offence against an excise law. It was objected on behalf of the plaintiff that this judgment was not peremptory, and that the plaintiff in this action was at liberty

(1) Terry v. Huntington and Others, Hardr. 480., cited by Holt C. J. in Dr. Groenvelt v. Dr. Burwell, 1 Ld. Raym. 471.

(2) Fuller v. Fotch, before Holt, C. J., Carth. 346. Rep. temp. Holt, 287. S. C.

to disprove the truth of the matter of fact upon which the defendants grounded their judgment. But this was denied by the Court, and a distinction was taken, namely, that if the commissioners had intermeddled with a thing which was not within their jurisdiction, then all is coram non judice, and that may be given in evidence upon this action; but it is otherwise, if they are only mistaken in their judgment in a matter within their cognizance, for that is not enquirable, otherwise than upon an appeal.

A third case may be cited to the same effect. In an action of trover for a quantity of tea (1), it appeared in evidence that the plaintiff sent the tea for one Lloyd with a permit, but the porter in his way called at the house of one R., and set it down there, where the defendant, an excise officer, seized it as forfeited for being brought to R.'s house for R.'s use without a permit to that place, according to the statute 10 G. 1. c. 10. s. 16. Upon not guilty pleaded, the defendant, to shew that the property was out of the plaintiff, produced a condemnation by the commissioners of excise upon an information against R. for receiving this tea without a permit, which sentence, it was insisted, was conclusive evidence of that fact, being a judgment before a proper jurisdiction. On the other side it was insisted, that the plaintiff was no party to the suit; that R. had nothing to do with the tea; and that, if he made a feigned defence, or, as the case was, made default, yet the plaintiff ought not to be affected by that, but might shew, that this was a case not subject to forfeiture. But Lee C. J. said, "The judgment of forfeiture is a judgment on the thing itself. How the tea came to R.'s house was a matter proper for the consideration of the commissioners; and, if the plaintiff was willing to have defended the suit, he might have come in pro interesse suo, which as he has not done, his property is bound. There is no more in this than the common case, namely, that courts of law pay such deference to the judgment of each other in matters within their jurisdiction, that the first

(1) Roberts v. Fortune, before Lee C. J., Sittings after Easter Term 1742, 1 Hargr. Law Tracts, p. 468. n. from Ford's MS.

determination by a proper authority ought to prevail: so that, the tea being forfeited, the property could not be in the plaintiff." And upon this the plaintiff was nonsuited.

Acquittal.

An acquittal in the Exchequer was considered by Lord Kenyon, in the case of Cook v. Sholl (1), to be conclusive evidence of the illegality of the seizure. That was an action of trover for several pipes of wine seized by the defendant for want of a permit. At the trial of the cause, the plaintiff gave in evidence a record of acquittal in the Court of Exchequer. The defendant then insisted, that, under the circumstances of this case, the permit had expired, before the seizure was made; and Mr. Justice Heath, who tried the cause, was of that opinion; but, on its being suggested, that there had been a different determination in the Court of Exchequer, he reserved the point for the opinion of the Court of King's Bench, with liberty to enter a verdict for the defendant, if it should be adjudged for him. When the case came before the Court, Lord Kenyon thought the record of acquittal precluded all reasoning on the construction of the permit: but as the question respecting the judgment of acquittal was not upon the record, and the only question was on the construction of the permit, a verdict was entered for the defendant. This case, therefore, has not determined, that an acquittal in the Exchequer would be conclusive evidence of the illegality of a seizure, although certainly that appears to have been the opinion of Lord Kenyon. It may be observed, that an acquittal does not, like a conviction, ascertain any precise fact. The sentence might have proceeded on the ground, that sufficient evidence was not produced, on the part of the crown, to warrant the seizure; and though the sentence may be conclusive as against the crown, it seems reasonable, that it should not have such a conclusive operation, in an action for seizing the property, against a third person, who was not a party with the crown in the original proceedings, and had no notice or opportunity for supporting the condemnation.

(1) 5 T. R. 255., and see a case in 12 Vin. Ab. (A. b. 22.) pl. 1. before Price B. acc.

Sect. IV.

Of Sentences by Members of a College, Convictions before Magistrates, &c.

The principle, which has been before laid down as applicable to the sentences of courts of justice, seems to apply equally to the judicial proceedings of other tribunals, which are invested with an exclusive or peculiar jurisdiction.

Sentence of deprivation.

A sentence of deprivation or expulsion of one of the members of a college, by the master and fellows, or by the visitor on an appeal, upon a subject within their jurisdiction, is conclusive in courts of law. And the justice of their decision cannot be questioned even in the King's Bench, though it belongs to that court to control them, if they exceed the bounds of their jurisdiction. On this principle, a mandamus, to restore the fellow of a college, has been frequently refused. (1) In the case of Philips v. Bury, it was decided, on an appeal to the House of Lords, that a sentence of deprivation, by the visitor of a college acting within the limits of his visitatorial jurisdiction, was conclusive evidence in an action of ejectment for one of the college estates; and the judgment of the Court of King's Bench, which had been given on the opinions of three Judges against the opinion of Lord Holt, was reversed. (2) And in the last case on this subject, which was a prosecution for an assault in turning out of a college one who had been expelled, the Court of King's Bench determined, that evidence impeaching the sentence of expulsion had been properly rejected at the trial. (3)

Conviction by justice of peace.

A conviction by a justice of the peace, who has competent jurisdiction, is, till reversed or quashed, conclusive evidence in favour of the justice, in an action against him for false im-

(1) Dr. Widrington's case, 1 Lev. 23. Dr. Patrick's case, 1 Lev. 65. case of New College, 2 Lev. 14.
(2) Philips v. Bury, Skin. 447. 1 Ld. Raym. 5. S. C. 2 T. R. 346. S. C.
(3) R. v. Grundon, Cowp. 315.

prisonment. Thus in the case of Strickland against Ward (1), tried before Mr. Justice Yates, (which was an action of trespass and false imprisonment against the defendant, a justice of the peace,) the defendant produced in evidence, under the general issue (2), a warrant signed by him, reciting a conviction of the plaintiff for unlawfully returning to a parish, whence he had been removed, and requiring the keeper of a house of correction to keep the plaintiff to hard labour; he also produced the conviction, referred to in the warrant, regularly drawn up: Mr. Justice Aston, upon this, gave his opinion, "that the conviction could not be controverted in evidence, but that, as the justice had a competent jurisdiction of the matter, his judgment was conclusive, till reversed or quashed; and that it could not be set aside at nisi prius." The plaintiff was accordingly nonsuited.

Where the magistrate has committed to prison, not having any jurisdiction, he will be liable to an action for false imprisonment, though the conviction has not been reversed or quashed (3); as, where the plaintiff was convicted and committed to prison for destroying game, though, as it was proved, he had effects which might have been distrained, sufficient to answer the penalty, (the statute of 5 & 6 Ann. c. 14. enacting that the penalty is to be levied by distress and sale of the offender's goods, and, *for want of distress*, the offender to be committed to the house of correction;) (4) or, where the justice has committed to prison, on mere suspicion, without any information laid before him. (5) So, in the late case of Groome v. Forester and Goodwin (6), where an overseer of a parish was convicted under the stat. 17 G. 2. c. 38. s. 2. of neglecting to deliver over to the succeeding overseers a certain book belonging to the parish, particularly described in the information, and for this offence was adjudged to be commit-

(1) At Winchester Sum. Ass. 1767, from a MS. note in 7 T. R. 633. 12 East, 75. 16 East, 21.

(2) St. 7 Jac. 1. c. 5.

(3) Hill v. Bateman, 2 Str. 710. Crepps v. Durden, Cowp. 640. Morgan v. Hughes, 2 T. R. 225.

(4) 2 Str. 710.

(5) 2 T. R. 225. 12 East. 82.

(6) Trin. T. 1816. Maule & Selw. MS.

ted to the common gaol, "to be safely kept, until he shall have yielded up *all and every the books* concerning his said office of overseer belonging to the said parish," which were also precisely the terms used in the warrant of commitment, the Court of King's Bench determined, that this commitment was not authorised by the act of parliament, and was entirely void; for the warrant of commitment casts upon the gaoler the function of enquiring and determining, what were "all and every the books concerning the office of overseer," for the yielding up of which he was to discharge the prisoner, instead of requiring the gaoler to detain his prisoner, (as it ought to have done,) until he should yield up the particular book specified and described in the information; the warrant therefore subjected the prisoner to the risk of imprisonment for an indefinite period, namely, until he had complied with a condition of greater extent than was imposed by the act of parliament, and where the gaoler had not adequate means of judging, whether the prisoner should have in fact complied with the terms of the condition. The Court therefore determined, that the commitment made in pursuance of the adjudication, as well as the adjudication itself in respect of the imprisonment, was clearly an excess of jurisdiction, and that the imprisonment was a trespass in the committing magistrate, for which an action might be maintained.

It is reported to have been held (1), that, where actions for false imprisonment are brought against justices of peace, they are obliged to shew the regularity of their convictions; and that the informations laid before them, upon which their convictions are founded, must be produced and proved in court. But it appears from later authorities (2), that in such collateral proceedings, the informality of the conviction cannot be taken advantage of by the plaintiff; and that, if the magistrate was warranted in taking cognizance of the charge, and did in fact convict, this will be sufficient to protect him, however

(1) Hill v. Bateman, before Raymond C. J., 2 Str. 710.

(2) Massey v. Johnson, 12 East, 67. And see Gray v. Cookson and Clayton, 16 East, 13.

irregularly the conviction may have been drawn up. (1) It may also be collected from the late case of Gray v. Cookson (2), that, if the magistrate had a general jurisdiction over the subject-matter, evidence of facts not stated in the conviction is not admissible, to prove that the conclusion drawn by the magistrate was erroneous.

Rule as to limited jurisdictions.

It is a general rule, with respect to special and limited jurisdictions, that where a person acts as judge, (that is, where he has over the subject-matter a general jurisdiction, which he has not exceeded) he will not be liable to have his judgment examined in an action brought against him. (3) Thus if an ecclesiastical Judge proceeds to excommunicate in a cause, in which he has jurisdiction over the subject-matter, he will not be liable to an action, although he proceed to excommunicate erroneously; but if he excommunicates in a matter, in which he has no jurisdiction, he will be liable to an action. (4) And where a statute provides, that the judgment of commissioners, appointed by the act, shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding. It has therefore been held, that a certificate from commissioners for settling the debts of the army, stating that so much was due from the defendant (an army-agent) to the plaintiff (an officer), was conclusive in an action brought to recover the money; and that no evidence could be received to shew, that the commissioners had formed a wrong judgment. (5)

(1) Where a conviction has been quashed, the magistrate is protected in certain cases by stat. 43 Geo. 3. c. 141.

(2) 16 East, 21. 23. See also 7 T. R. 633, n.

(3) Marshalsea case, 10 Rep. 76. Dr. Groenvelt v. Dr. Burwell, 1 Ld. Ray. 454. 467.; 1 Salk. 396. S. C. Miller v. Seare, 2 Black. Rep. 1145. Mases v. Macferlan, ante, p. 315.

(4) Ackerley v. Parkinson and Mawdesley, 3 Maule & Selw. 411.

(5) Moody v. Thurston, 1 Str. 481. ruled by Pratt C. J.; and a new trial afterwards refused by the whole Court. See also Lane v. Hegberg, Bull. N. P. 19.; Earl of Radnor v. Reeve, 2 Bos. & Bull. 391.

CHAP. IV.

Of certain other Judicial Proceedings.

WE proceed now to treat of the admissibility of certain other judicial proceedings; and in the present chapter it is proposed to consider the admissibility of proceedings in Chancery, of depositions, inquisitions, examinations taken under acts of parliament, judgments of inferior courts, and, lastly, of awards.

SECT. I.

Of Proceedings in Chancery.

A DECREE in the Court of Chancery may be given in evidence on the same footing, and under the same limitations, as the verdict or judgment of a court of common law. (1) Decree.

The common opinion used to be, that a bill in Chancery, which had been followed up by other proceedings, was admissible in evidence against the complainant, as an admission of facts. (1) "The allegations in the bill, it was said, must be supposed to be true: nor is it to be presumed, that the bill was preferred by a counsel or solicitor, without the privity of the party himself. (2)" However, it is notorious that many of the facts stated in the bill are the mere suggestions of counsel, made for the purpose of extorting an answer from the defendant. The general rule therefore is, that a bill in Chancery will not be evidence, except to shew that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses (3): it is not to be admitted as evidence, in courts of law, to prove any facts either alleged or denied in the Bill.

(1) See ante, p. 315.

(2) Snow v. Philips, 1 Sid. 221. Gilb. Ev. 42. Woollett v. Roberts, 1 Chan. Cas. 64. contra.

(3) Lord Ferrers v. Shirley, Fitzgib. 196. Bull. N. P. 235. Bowerman v. Sybourn, 7 T.R. 3. 1 Wightw. 325.

bill. (1) Lord Kenyon, indeed, is reported to have admitted a bill in Chancery, filed by an ancestor, to be evidence of a pedigree there stated, as a declaration in the family. (2) But it was resolved by the Judges in the Banbury peerage case, on a question put to them by the House of Lords, that a bill in equity, or depositions, cannot be received in evidence in the courts below, on the trial of an action of ejectment, against a party not claiming or deriving in any manner under the plaintiff or defendant in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree. (3) And even if the bill or depositions could be received, some extrinsic proof must be given of the relationship between the complainant and the party whose pedigree is disputed. It would not be sufficient, that the bill purports to have been filed by a relation. In the Banbury peerage case before mentioned, where C. D.'s legitimacy was in question, the claimant offered in evidence a bill filed in C. D.'s name by E. F. his uncle and next friend, stating his legitimacy, but there was no proof that E. F. was his uncle: the Judges, being referred to for their opinion, were unanimous, that extrinsic proof of the relationship was essential, and the bill, which was above 150 years old, was accordingly rejected. (3)

Answer.

Answers in Chancery are confessions on oath, and therefore strong evidence against the party who makes them. When an answer is read, all the parts must be taken together, connected, and entire. If only a part is read in evidence, the other party is entitled to have the whole read (4); and if, on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read, to explain

(1) Banbury Peerage case, reported from MS. in 2 Selw. N. P. 685.

(2) Taylor v. Cole, sitt. after Hil. term, 1799, 7 T. R. 3. n.

(3) MS. case, in 2 Selw. N. P. 685 Feb 1809. See also Berkeley Peerage case, supra, p. 247.; and Freeman v. Phillipps, supra, p. 251.

(4) By Holt C. J. Lynch v. Clarke, 3 Salk. 153. Earl of Bath v. Battersea, 5 Mod. 9.

what he swore in his first answer. (1) This is the general rule, when an answer of either party to the suit is given in evidence against him, to prove a point in issue. But if an answer is produced, merely for the purpose of shewing the incompetency of a witness, who has in his answer admitted himself interested in the event of the cause, that part only is to be read which states the ground of interest (2); for if the witness is incompetent, his evidence ought not to be received in any form; on the other hand, if he is competent, he ought to be examined vivâ voce in open court.

When you read the answer of a party, says Ch. B. Gilbert, the confession must be all taken together: you shall not take only what makes against him, and leave out what makes for him; for the answer is read as the sense of the party. (3) But although the defendant may regularly insist on having the whole of the answer read, that, by comparing the several parts with each other, the true meaning and extent of the admissions may be more clearly understood, it will not therefore follow, that all the parts of his statement are equally credible, or that every thing, which he asserts, is to be admitted, as strictly proved. If, for example, he states a fact, not from his own knowledge, but on mere report, that would not be evidence in his favour; as, on the other hand, it would not be evidence against him, in case he had acknowledged the report to be different. The objection is, not that he speaks in his own behalf, for that difficulty is waved by the other party, who offers the answer in evidence, but that he speaks from hearsay, and has not the means of knowledge, which alone can be resorted to. In the case of Roe on demise of Pellatt and others against Ferrars (4), where the defendant gave in evidence an answer by the lessors of the plaintiff, Mr. Justice Chambre, observing upon the degree of positive proof, which the lessors of the plaintiff had drawn from the answer in their own favour, expressed himself thus: — "It is true, that the

(1) R. v. Carr, 1 Sid. 418. Bull. N. P. 237. See ante, p. 111.

(2) Sparin v. Drax, trial at bar, Bull. N. P. 238.

(3) Gilb. Ev. 44. See ante, p. 111.

(4) 2 Bos. & Pull. 542. 548.

answer was introduced into the cause by the defendant, in whose behalf some parts of it were read. But in those parts, on which the lessors of the plaintiff relied, they speak only to what "they have heard as truth." I think that was not admissible evidence, for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to wave any objection to the competency of the testimony of the party making the answers, and that he does not thereby admit as evidence all the facts, which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for discovery. This point, he added, does not indeed appear to have been contested at the trial. Had it been contested, I should have thought the court bound to send the case down for a new trial."

Answer, evidence against privy.

An answer in a court of equity is evidence against the party who made it, and against all persons claiming under him. Thus, an answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe-hay by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence, in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. It is equally admissible in evidence, although a decree is not shewn to have been made in the suit (1); and proof of an examined copy will be sufficient proof of the answer. (1)

Answer of minor.

The answer of a minor by his guardian is not evidence against him (2); because, in reality, it is the guardian's answer. The guardian is sworn, not the minor, who possibly may

(1) Lady Dartmouth v. Roberts. 16 East, 334. The suit was abandoned by the vicar, who from that time had acquiesced. See also Travis v. Chaloner, 3 Gwill. 1277. Ashby v. Power, 3 Gwill 1239. Benson v. Olive, 2 Gwill. 701. Earl of Sussex v. Temple, 1 Ld. Raym. 310.

(2) Eccleston v. Petty, Carth. 79. 3 P. Wms. 237. Gilb. Ev. 44. Cowling v. Ely, 2 Starkie, 366.

know nothing of its contents. And therefore an answer, purporting to be the answer of a minor by his mother and guardian, may be read against the mother in another cause, where she is defendant in her own capacity. (1)

Answer of co-defendant.

The answer of one defendant, generally speaking, is not evidence against a co-defendant (2); for if that were allowed, a plaintiff might make one of his friends a defendant, for the purpose of procuring an answer in his favour against the co-defendant, who would have no opportunity of cross-examination. But as an admission by one of two partners, concerning joint contracts during the partnership, is good evidence to charge the other partner in an action against him alone (3): so, in an action by a creditor against some of the partnership firm, the answer of another partner to a bill filed by other creditors, has been received in evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those who are as one person with him in interest. (4)

Answer of married woman.

It does not appear to have been expressly determined, whether an answer by a married woman can be used as evidence against her in an action after the husband's death. In the case of Wrottesley against Bendish and his wife (5), (where it was argued, that the wife was not bound to answer, on the ground that the answer could not be read against her husband, nor against herself, as she is supposed to be under the control of the husband, and not to answer freely), the Lord Chancellor said, "he would not give any opinion, whether the answer may be read against the wife, when discovert; but as, in all times heretofore, the wife as well as the husband had been compelled to answer, he would not overthrow what had been the constant practice."

(1) Beasley v. Magrath, 2 Schoales and Lefroy's Rep. 31.

(2) Wych v. Meal, 3 P. Wms. 311. 12 Ves. jun. 361.

(3) Wood and others, Assignees of Hussey and others, v. Braddick, 1 Taunt. Rep. 104. See ante, p. 94.

(4) Grant v. Jackson and others, Peake, N. P. C. 203. See Lucas v. De La Cour, 1 Maule & Selw. 250.; also p. 95. supra.

(5) 3 P. Wms. 237. See Barron v. Grillard, 3 Ves. & Beam. 165.

Depositions.

Depositions in a suit in Chancery, which are the written examinations of witnesses taken by officers of the court, or by commissioners specially appointed for the purpose, may be given in evidence in an action at common law, on the same matter, between the same parties, or between any who claim under them, if it can be proved at the time of the trial that the deponent is dead (1); or, that he cannot be found after strict enquiry (2); or, that he has been subpœna'd and is unable to attend from sickness (3); or, if it can be proved, that he has been kept away by the contrivance of the other party (4); or, that he is out of the kingdom, or not amenable to the process of the court. (5) In either of these cases, depositions are admissible in evidence. But if the witness himself is in a state to be produced, his depositions cannot be received. The party who wishes to have the benefit of his testimony, ought, if he is able, to bring him forward, that he may undergo an open examination, in the face of the public, before the jury and the court: a mode of enquiry generally more conducive than any other to the discovery of truth.

Order for making depositions evidence.

It is the common practice in the Court of Chancery, when an issue or trial at law is directed, to make an order that the depositions of witnesses shall be read in evidence, if it be satisfactorily proved at the time of the trial, that they are unable to attend in person. (6) But this order is not made, for the purpose of making that admissible in evidence, which is of a nature not strictly admissible in courts of common law, but for the convenience of the parties. For if depositions are offered at the trial without such an order, the whole record, bill, answer, &c. must be proved; but if there is an order for reading the depositions, the court of law will read them

(1) Godb. p. 193. pl. 276. & p. 326. pl. 418. Fry v. Wood, 1 Atk. Rep. 445. Coker v. Farewell, 2 P. Wms. 563. Gilb. Ev. 54. Bull. N. P. 239.

(2) See cases in (1). Benson v. Olive, before Reynolds C. B. 2 Str. 920.

(3) Luttrel v. Reynel and others, 1 Mod. 283. Adm. per cur. in Kinsman v. Crooke, trial at bar, 2 Ld. Ray. 1166. 1 Atk. 445. Gilb. Ev. 54. Bull. N. P. 239. 1 Ves. & Beam. 22. 340. Jones v. Jones, 1 Cox. Cas. 184.

(4) Bull. N. P. 243.

(5) 1 Atk. Rep. 445. Lord Altham v. Earl of Anglesey, tr. at bar in K. B., Gilb. Eq. Cas. 16. 18.

(6) Corbet v. Corbet, 1 Ves. & Beam. 310.

without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. (1)

When a witness has been examined on interrogatories, and, afterwards happens to become interested, the Court of Chancery has allowed his depositions to be read for him, as evidence in his own suit, on a bill of revivor. (2) "This," said Lord Hardwicke, "has been allowed on just reason; because his evidence must be taken, as it stood at the time of his examination, which should not be set aside, unless it could be supplied by other evidence." (3) But a different rule has been established in courts of common law. It was resolved in Tilly's case, by the unanimous opinions of the courts of King's Bench and Common Pleas, that a party to an action of ejectment could not give in evidence his own depositions, though he had made them at a time when he was perfectly disinterested. (4)

Depositions not evidence against a stranger.

Depositions are not to be admitted in evidence for a party to the suit, against a stranger, who was not a party, nor claims under either of the parties (5); nor can they be used by a stranger against one of the parties. (6) An exception has been made in cases, where the question is on the existence of a custom, or on the right to tolls, or where hearsay and reputation would be good evidence (7); and in such cases, depositions are admissible in evidence, in a suit between other parties, provided they have not been made *post litem motam*. But if the question at issue is precisely the same in

(1) Palmer v. Ld. Aylesbury, 15 Ves. jun. 176.

(2) Goss v. Tracy, 2 Vern. 699. 1 P. Wms. 287. S. C. Haws v. Hand, 2 Atk. 615.

(3) In Glyn v. Bank of England, 2 Ves. 42.

(4) Tilly's case, 1 Salk. 286. See also Holcroft v. Smith, Eq. Cas. Ab. 224.; Baker v. Lord Fairfax, 1 Str. 101.; Bull. N. P. 242.

(5) Hob. Rep. 155. 2 Roll. Ab. 679. pl. 8. 1 Vern. 413., Cooke v. Fountain.

(6) Rushworth v. Countess of Pembroke and Currier, Hardr. 472. Gilb. Ev. 55. See ante, p. 319.

(7) Bull. N. P. 239. See ante, p. 320.

both suits, the depositions in the former suit cannot be admitted. (1)

Depositions on leading questions.

Depositions in a suit, instituted for the purpose of perpetuating testimony, are not objectionable on the ground that the interrogatories, in answer to which they were made, were leading interrogatories, and such as could not regularly be put on the examination of a witness. Thus, in the case of Williams v. Williams (2), where the question was as to the locality of certain lands, whether they were situated in the county of A. or in that of B., an exemplification was produced of an ancient record of proceedings in a suit in the Court of Chancery to perpetuate testimony; and an objection was taken to several of the depositions, that the interrogatories were leading. But the objection was over-ruled; and the Court of King's Bench afterwards determined, that the depositions had been properly admitted: for the party, against whom the depositions were originally made, had an opportunity of objecting to them, and might have applied to have them expunged, instead of which he allowed publication to pass, and the evidence to be exemplified; the objection, therefore, though it might have been taken with effect in the first instance, was now too late, after such an acquiescence by the party.

Depositions, after bill dismissed.

When a bill has been dismissed, the rule respecting the admissibility of the depositions has been laid down with the following distinction. If the bill was dismissed, because the court considered the matter to be unfit for equity to decree, the depositions may still be given in evidence, provided the subject-matter of the suit was regularly before the court, and within its jurisdiction. (3) But if the suit in equity be dismissed for the irregularity of the complainant, it has been said, that the depositions in that cause cannot be read in any fresh suit. Thus, where a devisee brings a bill of revivor, on

(1) Berkley Peerage case, supra, p. 247. Freeman v. Phillips, supra, p. 251.

(2) 4 Maule & Selw. 497. And see infra, p. 368. n. (4), (5).

(3) Smith v. Veale, 1 Ld. Raym. 735.

a suit commenced by his devisor, and depositions are taken, and then the cause on the hearing is dismissed, because a devisee, claiming as a purchaser and not by representation, cannot bring a bill of revivor, the devisee will not be allowed, on exhibiting a new original bill, to use the former depositions; for, in the first cause, in which the complainant mistook his remedy, there was no complaint regularly before the court, and consequently there could not regularly be any depositions. (1)

Depositions, before answer put in.

If the witness after being examined de bene esse should die before the defendant puts in his answer, his deposition cannot be read (2), because the opposite party had not the power of cross-examination; and the rule of common law is strict, that no evidence shall be admitted, but what is or might have been under the examination of both parties. "In such a case," says Ch. B. Gilbert (3), "the course is to move the court of Chancery, that the deposition of the deceased witness should be read; and, if the court see cause, they will order it, and this order will bind the parties to assent to the reading of such depositions, though it does not bind the court of nisi prius."

The reason why depositions are not read in evidence, before the defendant has put in his answer, has been before mentioned to be, because it does not otherwise appear that the adverse party had liberty to cross-examine. This reason will not apply, where the defendant is in contempt for refusing to answer. If the adverse party, says Ch. B. Gilbert, had been in contempt, then the depositions of the witnesses shall be admitted, for then it is the fault of the objector that he did not cross-examine the witnesses, since he would not join the examination. (4) This subject came before the court of

(1) Backhouse v. Middleton and others, Chan. Cas. 175. Gilb. Ev. 56.

(2) —— v. Browne, Hardr. 315. Dutton v. Colt, Sir T. Ray, 335. n. Ford v. Guy, cited in Howard v. Tremaine, 1 Show. 363. Piercy v. ——, 2 Jon. 165. Bull. N. P. 240.

(3) Gilb. Ev. 57, 58. Bull. N. P. 240. And see Marsden v Bound. 1 Vern. 331.

(4) Gilb. Ev. 56.

King's Bench in the course of Cazenove v. Vaughan (1); from which it now appears to be clearly settled, that depositions are not allowed to be read in evidence, before answer put in, or before the party is in contempt, unless he has had an opportunity of cross-examining; but if he has had such an opportunity, and has omitted to avail himself of it, he cannot afterwards make that a ground for objecting to the depositions as evidence.

Sect. II.

Of Depositions, Examinations, Inquisitions, &c. &c.

Depositions on interrogatories.

Depositions are frequently taken with the consent of the parties to a suit, when a material witness is about to leave the kingdom, or resides abroad. (2) These depositions may be given in evidence, if at the time of the trial the witness has quitted the country; (3) and they are admissible in criminal, as well as in civil, cases. (4) But if the trial comes on before his departure, or after his return, the depositions cannot be read. This rule, however, is not to be taken so strictly, as to make it absolutely necessary, that a witness, who is about to go abroad, should be on his voyage, when the trial comes on. If the ship has sailed, though it may have put back, or if the witness be on board, and the ship ready to sail, though prevented by contrary winds, that seems to be sufficient. (5) But it would not be sufficient to shew, that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort had been lately made to find him. (6)

Depositions in India.

Where an indictment or information is exhibited in the King's Bench for an offence committed in India, or where a

(1) 1 Maule & Sel. 4.

See ante, p. 15. As to the mode of taking the examination on interrogatories, see 2 Tidd. Pr. 854.

(3) Anon. case, 2 Salk. 691.

(4) R. v. Morphew, 2 Maule & Selw. 602.

(5) Fonsick v. Agar, 6 Esp. N. P. C. 92. Ward v. Wells, 1 Taunt. 461.

(6) Falconer v. Hanson, 1 Campb. 172.

suit has been commenced in any court in this country for a cause of action arising in India (1), the depositions of witnesses may be obtained under the provisions of the statute 13 G. 3. c. 63. ss. 40. & 44. This statute enacts, that the court may award a writ of mandamus to the Judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the court upon oath administered according to the form of their several religions; and these depositions, duly taken and returned, in the form prescribed by the act, are to be allowed and deemed as good and competent evidence, as if the witness had been sworn at the trial, and examined vivâ voce.

Depositions before commissioners of bankrupt.

The depositions of witnesses, taken by commissioners of bankrupt, could not formerly be given in evidence, in an action to try the question of bankruptcy or any other question connected with it, because in these proceedings the parties interested had not the power of cross-examining the witnesses. (2) But now, by the statute 5 Geo. 2. c. 30. s. 41. "Upon petition of any person to the great seal, praying that the commission and the depositions taken thereon, or any part of such depositions, and any other matter or thing relating to the commission or the proceedings thereon, may be entered of record, the great seal may direct them to be entered of record; and in case of the death of the witnesses proving the bankruptcy, or in case the commission, depositions, proceedings, or other matters or things, be lost or mislaid, a true copy of the record of such commission, depositions, and proceedings, or other matters or things, signed and attested as therein mentioned, may upon all occasions be given in evidence to prove such commission and the bankruptcy of such person against whom the commission issued, or other matters or things."

These depositions, when recorded, are evidence in an action at law, to prove the precise time, when the act of

(1) Francisco v. Gilmore, 1 Bos. & Pull. 177.

(2) 2 Roll. Ab. 679. pl. 9. Bull. N. P. 242.

bankruptcy was committed (1); "for the witness cannot tell his story before the commissioners, without saying when the act of bankruptcy was committed. He must mention that naturally and of course, and therefore is the more likely to speak the truth. In many cases, its being an act of bankruptcy depends on the time. The legislature considered the commissioners as indifferent persons, examining the witnesses with impartiality, and taking care of the interests of all parties." (2)

Proceedings in bankrupt cases under st. 49 G. 3.

The statute 49 G. 3. c. 121. s. 10. enacts, that, in all actions brought by or against assignees, the commission and the proceedings of the commissioners are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless the other party in the action, if defendant, at or before the time of pleading to the action, and, if plaintiff, before issue joined, give notice in writing to such assignee, that he intends to dispute the same. And by section 11. of the same act, in all suits in equity by or against assignees, the commission and proceedings are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, against all the other parties in the suit, unless such parties, some or one of them, within ten days after rejoinder in the cause, give notice in writing to the assignees, that they intend to dispute the same.

1. Evidence, between what parties.

This statute applies only to those cases, where the assignees are parties to the action. In an action between third persons, if the validity of a commission of bankruptcy comes incidentally into question as a ground of defence, it must be regularly proved, as it would have been before the passing of the statute. (3) But the statute is not confined to cases where the assignees are named as such upon the record; and will apply, where the opposite party knows, that they make out their title under the commission. (4) Nor is the statute con-

(1) Janson v. Wilson, 1 Doug. 257.

(2) By Ld. Mansfield, ib.

(3) Doe dem. Mawson v. Liston, 4 Taunt. 741.

(4) Simmonds v. Knight, 3 Campb. 251.

fined to the case where the assignees are the only defendants on the record; if there are other co-defendants, who justify as servants of the assignees, the statute equally applies. (1)

When the proceedings are offered in evidence, it will be sufficient to prove, that they came out of the proper custody, namely, that of the solicitor to the commission, or to prove the hand-writing of one of the commissioners, before whom they were taken. (2) Such evidence is necessary, although there has not been any notice of an intention to dispute their validity. 2. Custody of the proceedings.

The statute requires the notice, on the part of the plaintiff, to be given before issue joined. A notice, therefore, delivered at the time of delivering the issue with notice of trial, is plainly insufficient. (3) The notice by the defendant is to be given at or before the time of pleading; if he has omitted to give notice before pleading, the regular course is to apply to the Court for leave to withdraw his plea and plead *de novo*; the last plea would then be considered the party's plea to all purposes, and a notice given at the time of pleading such plea is a sufficient compliance with the statute (4): but, without an application to the Court, he cannot regularly withdraw the plea, and deliver it again with a notice, though the time for pleading has not yet expired. (5) With respect to the serving of the notice, service on the assignee in person is not necessary; a delivery of the notice to the attorney of the party is the best for all practical uses, and will be sufficient; but it is not a *good* service, to deliver the notice to a servant at the dwelling-house of the assignee. (6) A notice, that the defendant means to dispute the validity of the commission, is not to be considered as part of his evidence in the cause, but may be proved at the beginning of the trial, and immediately calls on 3. Service of notice.

(1) Gilman v. Cousins and others, 2 Starkie, 182. by Bayley J.
(2) Collinson v. Hillear, 3 Camp. 36.
(3) Richmond v. Heapy, 4 Camp. 207.
(4) Decharme v. Lane, 2 Camp. 324.
(5) Poole v. Bell, Holt, Rep. 328.
(6) Howard v. Ramsbottom, 3 Taunt. 526.

the plaintiff to support the commission in the same manner as before the act passed. (1)

4. Effect of the proceedings, as evidence.

The words of the statute are, that the commission and the proceedings of the commisioners are to be received *as evidence* of the several matters there specified, unless the other party give notice in writing, that he intends to dispute the same. If such notice is not given, the proceedings are *primâ facie* evidence; but not conclusive, as was at first supposed. (2) The bankrupt, in an action against the assignees, may call witnesses to contradict the depositions respecting the petitioning creditor's debt, the trading or the bankruptcy, although he has not given such a notice to the assignees. (3) The examination of a bankrupt before the commissioners is evidence against him, although the questions were improperly put to him with a view to the action (4), and though he might have demurred to them as exposing him to penalties. (5)

If the witness, examined before the commissioners, has signed the examination after it was read to him, it must obviously be immaterial with respect to the question of admissibility, whether every word used by him was taken down, or only the substance of what appeared to be relevant. (6) And if he refers in his examination to a written document, as containing a statement of the facts to which he is questioned, that document may be read as part of his examination. (7)

As the proceedings are made evidence by the statute, the deposition of the petitioning creditor is admissible evidence of the petitioning creditor's debt, though he himself would not have been a competent witness to support the commission. (8) And if a deposition state, that the deponent witnessed the

(1) Decharme v. Lane, 2 Campb. 324.

(2) Humphries v. Coggan, 1812, 1 Rose, Bank. Cas. 226.

(3) Ellis v. Shirley, 3 Campb. 424. Jones v. Llewellyn, 1 Merivale, 6. (*a*). Mills v. Bennett, 2 Maule & Sel. 556.

(4) Stockfleth v. De Tastet, 4 Campb. 10.

(5) Smith v. Beadnell, 1 Campb. 30.

(6) Milward v. Forbes, 4 Esp. N. P. C. 172.

(7) Falconer v. Hanson, 1 Campb. 171.

(8) Bisse v. Randall, 2 Campb. 493.

party's execution of a deed, by which he assigned his property to A. B., (such a deed, as would be an act of bankruptcy,) this is evidence of the deed being executed, without the production of the deed. (1) Still, however, depositions may be objected to as defective and insufficient, in not proving the subject-matter to which they apply; as, where the deposition of the petitioning creditor states only, that the debt was due to him at and *before the time of suing forth the commission*, not shewing that it existed at the time of the act of bankruptcy, this has been held to be insufficient (2); and it is not necessary to give notice of an intention to dispute the proceedings, in order to take this objection. So also a deposition stating, that the party absented himself on a certain day, and that he had declared to the deponent, that his motive for absenting himself was to avoid his creditors, but not stating the time when this declaration was made, is not a sufficient proof of an act of bankruptcy. (3)

In an action of assumpsit for a creditor's share, under an order of commissioners for a dividend, the proceedings of the commissioners are conclusive evidence of the debt, against the bankrupt's assignees (4): where the debt has been once liquidated before the commissioners, it cannot be litigated, except on an application to the great seal. But on an indictment for perjury, charged to have been committed by the defendant in passing his examination before the commissioners, strict evidence of the bankruptcy seems to be necessary, and the commission and proceedings under it will not be sufficient proof; for the authority of the commissioners in taking the examination is grounded, not in the commission, but in the bankruptcy. (5)

4. Right of inspecting the proceedings.

Only such of the depositions, as are read, are to be considered as given in evidence. The opposite party cannot

(1) Kay v. Stead, 2 Starkie, 200.; by Wood, B

(2) Clarke v. Askew, 2 Starkie, 458., by Bayley J.; and the Court of K. B., on a motion for a new trial, were of the same opinion.

(3) Marsh v. Meager, 1 Starkie, 353.

(4) Brown v Bullen, 1 Doug. 407.

(5) R. v. Punshon, 3 Campb. 96.

inspect any other deposition, for the purpose of cross-examining a witness; but he may afterwards call for that deposition, and read it in evidence for the purpose of contradicting him. (1) The proceedings are kept for the benefit of the creditors, and there is no right to inspect them as public documents.

Depositions before justices of peace.

Justices of the peace are enabled and directed to take the depositions of witnesses in cases of felony, by the statutes 1 & 2 Ph. & M. c. 13. s. 4., and 2 & 3 Ph. & M. c. 10. (2) By the first of these statutes, "justices of the peace, when any person is brought before them for manslaughter or felony, being bailable by law, shall, before any bailment, take the examination of the prisoner, and the examination of them who bring him, of the fact and circumstances thereof, and the same, or as much as may be material to prove the felony, shall put in writing, before they make the bailment; which examination, with the bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission."

As this statute extended only to bailable felonies, and not to cases where the justice committed a prisoner on suspicion of manslaughter or felony, (in which cases, however, the examination of the prisoner, and of those who brought him before the magistrate, was more necessary, than where the prisoner was bailed,) it was therefore enacted by statute 2 & 3 Ph. & M. c. 10., "that the justice, before he shall commit a prisoner, brought before him on suspicion of manslaughter or felony, shall take the examination of the prisoner, and the information of those who bring him, of the fact and circumstance thereof, and shall put the same, or as much thereof as shall be material to prove the felony, in writing, within two days after the said examination, and the same

(1) Bluck v. Thorne, 4 Campb. 191.

(2) 1 Hal P C. 305. 385. 2 Hal. P. C. 52. Tong's case, Kel. 19. Paine's case, 1 Salk. 281. Woodcock's case, 2 Leach, Cr. C. 565.

shall certify in such form and at such time as they ought to do, if such prisoner so committed had been bailed."

1. Deposition, when evidence.

In the construction of these statutes, it seems now to be settled (1), that the deposition of a witness, taken upon oath (2), in the presence of a prisoner (3) who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved on oath to the satisfaction of the Court, that the informant is dead (4), or not able to travel (5), or that he is kept away by the means and contrivance of the prisoner (6); provided also, that the deposition, offered in evidence, is proved to be the same, as was sworn before the justice, without any alteration. (7) Before the statute of Philip and Mary, a deposition taken before a justice of the county, where a felony was committed, would not have been evidence, even though the witness had died or was unable to travel. (8)

2. Deposition, how taken.

The deposition ought to be taken as nearly as possible in the words used by the deponent; the statute requiring the magistrate to take the information of those, who bring the prisoner, and *put the same, or as much thereof as shall be material to prove the felony*, in writing. It has been before observed, that the information should be taken in the presence of the prisoner, to give him an opportunity of cross-examining. The prisoner is usually allowed to be present from the commencement of the examination; but in case any part of the inform-

(1) See Hawk. P. C. b. 2. c. 46. s. 15.

(2) 1 Hale, P. C. 305. 586. 2 Hal. P. C. 52. 120. 284. Dalton. Just. c. 111. p. 369. Bull. N. P. 242.

(3) R. v. Payne, 5 Mod. 163. cited by Ld. Kenyon, 3 T. R. 723. Woodcock's case, 2 Leach, Cr. C. 566. R. v. Vipont, 2 Burr. 1163. R. v. Dingler, Leach, Cr. C. 638.

(4) 4th Res. in Ld. Morley's case, Kel. 55. Bromwich's case, 1 Lev 180. Dalt. c. 111. p. 369. Adm. per Cur. in Payne's case, 1 Salk. 281. Hal. P. C. 305. Bull. N. P. 242. Case of Fleming and Windham, 2 Leach, Cr. C. 996. Westbeer's case, 1 Leach, Cr. C. 14. (in which case the depositions were those of a deceased accomplice.)

(5) 1 Hal. P. C. 305. 586. 2 Hal. P. C. 52. Kel. 55., the case of depositions before a coroner.

(6) Kel. 55. Fost. Disc. p. 337. Harrison's case, 4 St. Tr. 492.

(7) 1 Hal. P. C. 305. 2 Hal. P.C. 52. Kel. 55.

(8) 3 T. R. 710. 722.

ation has been taken while he was not present, it will be necessary to have that part afterwards read over distinctly in the presence of the prisoner and the deponent; and if the deponent then swear to the truth of the statement in the prisoner's presence, this will be a regular taking of the information, and the deposition may be used against the prisoner. (1)

. It is not essential to the validity of depositions, that they should be signed by the deceased witness. In Flemming's case, on an indictment for a rape, all the Judges concurred in opinion, that the depositions of a girl deceased, on whose person the crime had been committed, taken on oath by the committing magistrate, had been properly admitted in evidence at the trial, though the depositions were not signed by the deceased. (2) The informations against the prisoner are to be taken on oath; the examination of the prisoner, not upon oath. (3) Parol evidence, to add to, or vary, the deposition, is not admissible. (4)

1. Deposition, evidence only in case of felony.

The information of witnesses, taken before justices of the peace, cannot be given in evidence on an indictment for a misdemeanor, (as, on an information for publishing a libel,) or in civil actions, or on an appeal for murder. (5) Nor can a conviction for petty treason be grounded on such evidence (6); for the statute 1 Ed. 6. c. 12. s. 22. enacts, "that no person shall be indicted, arraigned, condemned, or convicted, for any offence of treason or petty treason, unless he be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same;" and this is confirmed by statute 5 & 6 Ed. 6. c. 11. s. 12., which enacts, "that no person shall be indicted, arraigned, condemned, convicted, or attainted, for any of the treasons specified in the act, or for any other treasons, unless the offender be accused by two lawful accusers; which said

(1) R. v. Smith, 2 Starkie, 208. Holt, 614. S. C. By the opinion of the Judges, to whom the point was referred by Lord Ch. B. Richards.

(2) Case of Flemming and Windham, 2 Leach, Cr. C. 996.

(3) See ante, p. 114.

(4) R. v. Thornton, Warw. Summer Ass. 1817. by Holroyd, J.

(5) R. v. Payne, 1 Ld. Ray. 729.

(6) Foster Disc. 337.

accusers at the time of the arraignment of the party accused shall be brought in person before the party so accused, and avow and maintain what they have to say against the said party, to prove him guilty of the treasons or offences contained in the bill of indictment laid against the party arraigned; unless the said party arraigned shall willingly without violence confess the same." However, as a prisoner may be convicted of murder on an indictment for petty treason, the depositions are admissible in evidence to support a conviction of murder, though not sufficient to support a conviction of petty treason. (1)

4. Deposition, taken in another county.

The words of the statute 1 & 2 Ph. & M. c. 13. s. 4. which are also referred to and adopted by stat. 2 & 3 Ph. & M. c. 10., are, " that the justices shall certify the examination taken before them at the next general gaol-delivery within the limits of their commission." It often happens that the felon is taken and examined by a magistrate in a county, where the offence was not committed; in such a case, the examinations and informations are to be transmitted into the county where the felon is indicted, and may there be read in evidence against him, though the magistrate had not original cognizance of the offence. (2)

5. Deposition, to contradict witness.

As informations, when judicially and regularly taken, are evidence against a prisoner, if the informant dies before the trial; so, on the other hand, where the informant himself gives evidence, the informations may be used, on the part of the prisoner, to contradict his testimony. One of the objects of the legislature in passing the statutes, was to enable the judge and jury, before whom the prisoner is tried, to see whether the witnesses at the trial are consistent with the account given by them before the committing magistrate. (3) Thus, it was admitted in Lord Stafford's case (4), that the depositions of a

(1) Radbourne's case, 2 Leach, Cr. C. 512. Swan's case, Fost. Disc. 106.

(2) Dalt. Just. c. 111. p. 369. 2 Hal. P. C. 285. Cro. Car. 213. And see St. 44 G. 3. c. 92.

(3) See the judgment in Lambe's case, 2 Leach, Cr. C. 633.

(4) 3 St. Tr. p. 131. Hawk. P. C. b. 2. c. 46. s. 22.

witness, taken before a justice of the peace, might be read, at the desire of the prisoner, in order to take off the credit of the witness, by shewing a variance between the depositions and the evidence given in court *vivâ voce*.

Depositions before a coroner.

The statute 1 & 2 Ph. & M. c. 13. s. 5. enacts, "that every coroner upon an inquisition before him found, whereby any person shall be indicted for murder or manslaughter, or as accessory before the murder, shall put in writing the effect of the evidence given to the jury before him, being material; and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had."

On this statute, it has been resolved unanimously by all the Judges, that in case any of the witnesses, who have been examined before the coroner, are dead, or unable to travel, or kept out of the way by the means and contrivance of the prisoner, their depositions may be read on the trial of the prisoner, the coroner first proving, that they are the same which he took upon oath, without any addition or alteration. (1) And proof, that the witness has been enquired after and is not to be found, has been thought sufficient to authorise the reading of the depositions. (2) The statute requires the coroner "to put in writing the *effect* of the evidence given to the jury before him being material;" the true meaning of which appears to be, that he should at least take down the plain and obvious meaning of the words spoken by the witnesses, and not merely to state what, in his judgment, was the result of the evidence.

It does not appear from the report of either of the cases above cited, whether the depositions were taken by the coroner in the presence of the prisoner. But it seems to be the prevailing opinion, that they are admissible, though the pri-

(1) Lord Morley's case, Kel. 55. Thatcher's case, 2 Jon. 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124.

(2) Adm per Cur. in Harrison's case, before Holt. C. J., Atkins J., and Nevil J., 4 St. Tr. 496. Contra, 4th Res. in Lord Morley's case, Kel. 55.

soner may have been absent at the time of taking the inquisition. A book of authority (1), after stating the general rule, that depositions are not evidence, where there cannot be a cross-examination, adds, by way of exception, "yet, if the witnesses, examined on a coroner's inquest, be dead or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public, to make enquiry about the matters within his jurisdiction." And in the case of the King against the inhabitants of Eriswell (2), (where Mr. Just. Buller, in support of his opinion on the case then before the Court, stated, that depositions before a coroner had long been settled to be good evidence, though the person accused be not present when they are taken, nor ever heard of them till the moment, when they are produced against him,) Lord Kenyon, who differed from Mr. Justice Buller on the principal question, said (3), that the case, alluded to, was an exception founded on the statute of Philip and Mary. Besides, he added, the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access; and writs of ad quod damnum have been frequently set aside, for want of this notoriety in the execution of them by the sheriff. To this effect also Lord Hale lays it down (4), that the coroner's inquest must hear evidence on oath as well for the party accused as for the king, if it be offered to them; because the proceeding is not so much an accusation on an indictment, as an inquisition of office to enquire truly, how the party came to his death; and for an omission in this respect an inquisition of felo de se has been quashed.

Inquisition by coroner.

An inquisition of felo de se, taken before the coroner super visum corporis, is considered by Lord Coke to be conclusive evidence of the fact against the executors or administrators of the deceased. (5) But Lord Hale, in his Pleas of the Crown (6), is of a different opinion, conceiving it unreasonable,

(1) Bull. N. P. 242.
(2) 3 T. R. 713.
(3) 3 T. R. 722.
(4) 1 Pl. Cr. 415. 2 Pl. Cr. 60. Schorey's case, 1 Leach, Cr. C. 50.
(5) 3 Inst. 55.
(6) 1 Pl. Cr. 416. 1 East, P. C. 389.

that they should be concluded, and lose the goods of the deceased without an answer, by an inquisition, which may be taken by the coroner behind their backs. And it is now settled that such an inquisition may be removed into the King's Bench, and traversed by the executors and administrators of the deceased. (1)

If it be found by the coroner's inquisition, in case of the death of one who is not felo de se, that the person, who committed the offence, fled for it, the authorities hold this finding to be conclusive and not traversable; yet, upon principle, it should seem as if the one case were as much traversable as the other. (2)

Inquisition of escheat, &c.

There are various other kinds of inquisition of office, which, if regularly taken, and under a competent authority, will be admitted by courts of law as evidence of the facts there found. Some inquisitions are taken on an enquiry made by the sheriff, or coroner, or escheator, by virtue of their office, or under a writ directed to them for that purpose: others are taken by commissioners, specially appointed to examine witnesses on oath, and enquire into the several matters specified. These inquisitions are evidence of the facts there found, even against third persons. An inquisition of escheat, for instance, is evidence, in any suit and between any parties, that the person, who was the subject of enquiry, died without issue, as the commissioners have stated. This kind of inquisition is presented on the oath of a jury, and is a formal and solemn finding of the several facts. The escheators are bound to meet in a public and open place; and every person is to be allowed to give evidence openly in their presence. (3) On an inquisition also under a writ of extent, as to the effects in possession of a party, a person claiming property in the effects, which are the subject of inquiry, may put questions to

(1) See 1 Saund. 362. note 1. by the Editor, who has there collected the cases on this subject. As to the duty of the coroner in taking an inquest, see stat. 1 H. 8. c. 8.

(2) See n. (1), and Hawk. b. 2. c. 9. s. 54.

(3) St. 1 H. 8. c. 8.

the witnesses examined on the part of the prosecutor; and if the sheriff refuse to allow such questions, the inquisition will be irregular, and the extent may on this ground be set aside. (1)

Inquisition of lunacy.

An inquisition of lunacy is evidence on the trial of an indictment, to shew that the prisoner was insane, when he committed the offence. (2) Such inquisitions are evidence even against third persons, who were strangers to the proceeding. Thus, in a case, where an inquisition of lunacy was offered as evidence to affect the rights of third persons, and objected against as res inter alios acta, Lord Hardwicke over-ruled the objection, and said that inquisitions of lunacy, and likewise other inquisitions, as post mortem, &c., are always admitted to be read, but not conclusive. (3) So an inquisition taken by virtue of a commission, which issued in the reign of Queen Elizabeth, under the seal of the court of Exchequer, to commissioners to enquire, whether a prior was seized of certain lands as parcel of a manor, or whether the crown was seised of them after the dissolution of the priory, was adjudged to be good evidence of those facts. (4) And an inquisition, taken under an order of the House of Commons, is evidence respecting the fees of certain offices. (5)

Extrajudicial inquisitions.

Inquisitions, which are extrajudicial, are not admissible in evidence. Thus an inquisition made by a sheriff's jury, for the purpose of ascertaining who was entitled to the property of goods taken under an execution, is not admissible evidence even against the sheriff, in an action of trover brought by the party, in whose favour the inquisition was found. (6) This evidence was received at the trial of the cause by Mr. Justice

(1) R. v. Bickley, 5 Price, 454.
(2) R. v. Bowler, O. B. June, 1812, before Le Blanc J. and Lord Ch. J. Gibbs.
(3) Sergeson v. Sealey, 2 Atk. 412. Faulder v. Silk and another, 3 Campb. 126. See Jones v. White, ante, p. 329.
(4) Tooker v. Duke of Beaufort, 1 Burr. 146.
(5) Green v. Hewett, Peake, N. P. 184.
(6) Latkow v. Eamer and Burnett, Sheriff of Middlesex, 2 H. Blac. 437. Glossop v. Poole, 3 Maule & Selw. 175.

Buller, who admitted it, but held it not to be conclusive; and, a verdict having been found for the defendants, a motion was afterwards made for a new trial, on the ground, that the inquisition was conclusive evidence in favour of the plaintiff, as against the person who contested the property with the plaintiff, and who was present at the time of taking the inquisition. But the court refused the application. Ch. J. Eyre said, he doubted whether a sheriff can, strictly speaking, hold any inquisition as to property, except under a writ de proprietate probandâ in replevin. And Mr. Justice Buller said, he thought he ought not to have admitted the evidence at the trial, as the inquisition was not under the king's writ, but merely a proceeding by the sheriff on his own authority.

Examination of pauper as to settlement.

The general rule, respecting the admissibility of depositions after the death of the witness, is, that they are not evidence, unless they have been taken judicially, and unless the party, whose interests would be affected by them, had an opportunity of being present and cross-examining the deponent. It is therefore now clearly established, that the ex parte examination of a pauper concerning his settlement, taken on oath before magistrates, is not admissible, upon a question of settlement, as evidence against the appellant parish. (1) The objection against their admissibility is, not that the magistrates have no power to administer an oath, (for it seems to be admitted, that the statute 13 & 14 C. 2. c. 12. s. 1., which first gave them a power to remove, gave them also incidentally a power to examine the pauper preparatory to a removal,) (2) but that the examination is ex parte, obtained at the instance of overseers, whose parish would be benefited by the removal, and behind the backs of the appellants, who received no notice of the proceeding, and had not the benefit of a cross-examination. (3)

(1) R. v. Nuneham Courtenay, 1 East, 373. R. v. Ferry Frystone, 2 East, 54. R. v. Abergwilly, ib. 63.

(2) By Lord Kenyon, R. v. Eriswell, 3 T. R. 721. See Lambard, Just. b. 1. c. 21. p. 209.

(3) By Lord Kenyon, R. v. Eriswell, 3 T. R. 725.

There is one exception to this general rule, in the case of a soldier, examined as to his settlement; an exception, founded on the special provision of an act of parliament. The examination of a soldier, touching his settlement, is made evidence on an appeal, by the mutiny act (1), which enables " two or more justices for the county, where any soldier shall be quartered, in case he has either wife or child, to cause him to be summoned before them in the place, where he is quartered, in order to make oath of the place of his last legal settlement. And such justices are required to give an attested copy of such affidavit to the person making the same, to be by him delivered to his commanding officer, in order to be produced when required, which attested copy shall be at any time admitted in evidence as to such last legal settlement at any general quarter-sessions of the peace." As an attested copy is thus made evidence, it has been determined, on a reasonable and obvious construction of the act, that the original affidavit, which is a higher kind of evidence, ought to be admitted as well as the copy. (2) The statute however is to be construed strictly; and therefore no other attested copy is legal evidence, while the original is in existence, except that given to the soldier. (3)

The examination of a single woman before a magistrate, under the statute 6 G. 2. c. 31., (which enacts, that, in case any single woman shall, in an examination to be taken in writing upon oath before any justice, &c., charge any person with having gotten her with child, it may be lawful for the justice to issue his warrant for the immediate apprehension of such person, &c.) will be evidence after the woman's death against the reputed father, on his appearance at the sessions to abide the order of the court according to

Examination in case of bastardy.

(1) 55 G. 3. c. 108. s. 70.

(2) R. v. Warley, 6 T. R. 534. See Burdon v. Ricketts, 2 Campb. 121.

(3) R. v. Clayton-le-Moors, 5 T.R. 706. The opinion expressed in this case by Mr. Justice Lawrence, as to the admissibility of the examination, in case the soldier, who has been examined, should be abroad at the time of the trial of the appeal, has been since over-ruled; R. v. Warminster, Nov. 1. 1819. at Serjeant's Inn.

his recognizance. (1) This examination, taken by the directions of the statute in a judicial proceeding, will be evidence like depositions under the statute of Philip and Mary; although the proceeding before the magistrate is entirely ex parte, and though the party accused is not present at the woman's examination.

Depositions in ecclesiastical courts.

Depositions taken in an ecclesiastical court, in a cause within its jurisdiction, seem to be admissible in evidence upon the same footing as depositions in the Court of Chancery, the parties being the same, and having had an opportunity of cross-examining the deponents. Chief Baron Gilbert lays down the rule thus (2): "Depositions taken in the spiritual court in a cause relating to lands cannot be read, because they are no oaths at all, inasmuch as the spiritual courts have no authority to take depositions relating to lands: but it seems they may be read, when taken in a cause in which they have authority, as far as relates to that cause, inasmuch as these are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a court of record." It does not appear, in any of the cases above-mentioned, to have been thought essential to the admissibility of depositions, that they should be made in courts of record; but the material consideration was, whether they were taken judicially, and whether the other party, against whom they were offered in evidence, had any opportunity of cross-examining the deponent. And upon this principle, Lord Holt, in the case of Breedon v. Gill (3), was of opinion, that depositions before commissioners of excise, (who by statute 12 Car. 2. c. 24. s. 45. have a power to administer oaths on inquiring into forfeitures,) taken in the presence of the other party, and signed by the witness, would be admissible on an appeal from the sentence of the commissioners, in case the witness should be dead at the time of hearing the appeal. There are some authorities, which hold, that depositions of witnesses in an ecclesiastical court are not to be admitted in courts of common law (4); and one book of autho-

(1) R. v. Ravenstone, 5 T. R. 373.
(2) Gilb. Ev. 60.
(3) 1 Ld. Ray. 219. 222.
(4) Earl of Sarum v. Sir B. Spencer, 2 Roll. Abr. 679. pl. 5. Litt. Rep. 167. March, Rep. 120.

rity lays it down as a general rule, that depositions, taken in a court not of record, shall not be allowed in evidence elsewhere. (1) However, the better opinion seems to be, that such depositions are admissible in evidence, under the limitations above stated.

Judgments of inferior courts.

Judgments in a court baron, county court, or hundred court, and the judgments of any other inferior court recognised by the law of the land (2), are evidence between the same parties, upon the same points in issue, on matters within their jurisdiction. Thus, in an action of debt on a judgment recovered in an inferior court, the judgment will be evidence of the debt; but the defendant may show, if he can, that the cause of action was not within the jurisdiction of the court below. (3)

Award.

An award, regularly made by an arbitrator, to whom matters in difference are referred, is conclusive, in an action at law, on the parties to the reference, upon all matters within the submission. (4) What has been before said on the subject of judgments by a court of concurrent jurisdiction, may be said also of awards, that they are, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question. (5) Thus, in an action of ejectment, where the defendant and the lessor of the plaintiff had before referred to an arbitrator their respective claims to the property in question, the Court of King's Bench held, that the party had by his agreement concluded himself from disputing the lessor's title. (6) It has been before observed, that an award is not a bar to any cause of action, which the one party had against the other at the time of the reference, if it appear that the subject-matter of the action was not enquired into before the arbitrator. (7)

(1) Bull. N. P. 242. See ante, p. 315.
(2) Com. Dig. "Evidence," (C 1.)
(3) Herbert v. Cook, reported in note (a), Willes, Rep. 36. See Moses v. Macferlan, ante, p. 315.
(4) See ante, p. 326.
(5) See ante, p. 315; and Campbell v. Twemlow, ante, p. 90.; and R. v. Cotton, ante, p. 251.
(6) Doe dem. Morris. v. Rosser, 3 East, 15.
(7) Ravee v. Farmer, 4 T. R. 146. ante, p. 325.

Certificate of conviction.

Certificates of convictions are made evidence in several cases, by the express provision of the legislature. On the trial of a prosecution, for a second offence in uttering counterfeit money, a certified transcript of a former conviction, by the clerk of the assize or clerk of the peace, containing in a few words the effect and tenor of the conviction, is sufficient proof of the former conviction. (1) On a prosecution, also, of a felon, for being at large unlawfully before the expiration of his term of transportation, a certified transcript of the indictment, of the conviction of the felon, and of the order for transportation, has been made sufficient proof, that the person there named has been before convicted and ordered for transportation. (2)

Certificate of vice-consul.

The certificate of a vice-consul has been compared to a foreign judgment. But the vice-consul is not, properly speaking, a judicial officer; nor is his certificate to be admitted as evidence of the fact there stated. In the case of Waldron v. Coombe (3), the Court of Common Pleas determined, that the certificate of a British vice-consul in a foreign country could not be received here as evidence of the amount of a sale, although by the law of that country he was constituted general agent for all absent owners of goods, and was authorised and compelled to make the sale in question.

Other certificates.

A certificate of the king under his sign manual has been admitted in an old case, as evidence of a fact, in a suit on a promise of marriage (4); the report states, that the certificate was allowed for proof, *without exception*. But it is laid down in Rolle's Abridgment (5), "that the king, as it seems, cannot be witness in a cause by letters under his sign manual." And Lord Ch. Justice Willes, in his judgment in the case of

(1) St. 15 G. 2. c. 28. s. 9.

(2) St. 6 G. 1. c. 23. s. 6. Several other cases, in which similar transcripts are made evidence, may be seen in vol. 1. of Russell's Treat on Crimes, b 2. ch. 36.

(3) 3 Taunt. 162. Roberts v. Eddington, 4 Esp. N. P. C. 88.

(4) Abignye v. Clifton, Hob. Rep 213. See 3 Woodeson, Lect. 275.

(5) 2 Roll. Ab. 686. (H.) Art. 1., citing the case of Abignye v. Clifton, contra.

Omichund v. Barker (1), says, " Even the certificate of the King, under his sign manual, of a matter of fact, has been always refused, except in one old case in Chancery," referring to the case in Hobart. A certificate under the seal of a minister abroad, as to the fact of a marriage having been solemnized before him, was admitted also in an old case (2); but the admissibility of such evidence has been questioned (3); and it can not be doubted, but that the evidence would now be rejected. A certificate from the secretary at war, as to the nature of the station of a serjeant in the army, is said to have been admitted, though opposed, in the case of Lloyd v. Woodall (4); but for what reason, or upon what principle, is not stated. The general rule is, that our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. (4) — A certificate of justices, certifying that a highway, which is the subject of an indictment, is in a state of repair, is admitted, in common practice, as an adjudication of the state of repair, after a plea of guilty pleaded by the parish. (6) A certificate of the enrolment of a fine is evidence of the enrolment, for the reason mentioned in the following chapter. A protest, as to the presentment and non-acceptance of a foreign bill of exchange, attested by a notary public, is evidence of those facts, in an action upon the bill: this is a relaxation of the strict rule, from a principle of general convenience. (7) A certificate of the discharge of an insolvent debtor by the quarter sessions, under the insolvent act of 2 G. 2. c. 20., is evidence of the fact of his discharge. (8)

(1) Willes, Rep. 550.
(2) Alsop v. Bowtrell, Cro. Jac. 541.
(3) Willes, Rep. 549.
(4) 1 Black. Rep. 29.
(5) By Willes, Ch. J. Willes, Rep. 550.
(6) 6 T. R. 635. 630.
(7) Willes, 550.
(8) Gillum v. Stirrup, Rep. Temp. Hard. 144. Action of debt on bond; discharge pleaded in bar.

CHAP. V.

Of the Proof of Records and Judicial Proceedings.

THE admissibility of judicial proceedings having been treated of in the preceding chapters, it remains to consider how their contents are to be regularly proved, so as to render them producible in evidence.

Records. Records are, for security, preserved in public repositories, and, as they cannot be removed from place to place to serve a private purpose, examined copies are admitted as the best producible evidence. (1)

Public statutes. Public acts of parliament are presumed by the law to be known to every individual. Printed copies, therefore, of public acts, and the printed statute-books, are resorted to by courts of justice, not strictly as evidence, but as serving to refresh the memory. (2) And by the statute 41 G. 3. c. 90. s. 9., made for the better and more effectual proof of the statute-law of this country in Ireland, and of the Irish statute-law in Great Britain, it is enacted that copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorised, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.

In some acts of parliament, not relating to the kingdom at large, a special clause is often inserted, declaring them to be public acts. Such acts are to be considered on the same footing, and of the same authority in courts of justice, as those above mentioned; and proof of the contents will be as unnecessary in this case, as where a statute is public without the aid of such special clause.

Private acts. A clause is also frequently inserted in some private acts,

(1) Leighton v Leighton, 1 Str. 210. See ante, p. 309. (2) Gilb. Ev. 8.

providing that they shall be printed by the king's printer, and that a copy so printed shall be admitted as evidence of the acts. When a private act of parliament, not containing such a clause, is required in evidence, the regular proof is by an examined copy, compared with the original in the parliament-office at Westminster. Even in the case of a private statute, however, if one of the parties to the suit has done an act under the statute, against which act the other party appeals, and the regularity of which proceeding is the question to be tried, there the appellant will not be obliged to produce an examined copy, but a common printed copy will be sufficient. (1)

Exemplification of record.

Copies of records in courts of justice are of two kinds: under seal, and not under seal. Those under seal are called exemplifications, and are of higher credit than any sworn copy: for "the courts of justice, that put their seal to the copy, are supposed more capable than a common person to examine, and more exact and critical in their examination." (2) These exemplifications are of two kinds; under the great seal of Chancery, or under the seal of some other court. (3)

1. The practice is not to exemplify a record under the great seal, unless it be either a record of the Court of Chancery, or be sent from some other court into Chancery, the centre of all courts, by writ of certiorari. But in either of these cases a copy may be obtained, under the attestation of the great seal. (4)

If the record of a court is put in issue by a proceeding in the same court, the record itself is inspected by the Judges. But when the record, denied by the issue, is in a court of

(1) R. v. Shaw, 12 East, 479. Appeal against a rate, made by the respondent under a private act. In this case, as Mr. Justice Le Blanc observed, the respondent ought to begin, by shewing that he had a right to make the rate under the act.

(2) Gilb. Ev. 11, 12.

(3) Gilb. Ev. 12.

(4) 3 Inst. 173. Gilb. Ev. 12, Bull. N. P. 226.

superior or concurrent jurisdiction, the trial is then by the tenor of the record, which may be obtained by certiorari and mittimus out of Chancery (1), a method adopted for the purpose of communicating evidence of records from one superior court to another, without the inconvenience of removing the originals. If the record of an inferior court is disputed in a suit before a higher tribunal, the certiorari may be issued out of a superior court, as well as from the Court of Chancery. (2) And in pursuance of this writ, where the superior court sends for the record of an inferior court, not for the purpose of seeing whether their proceedings are within the limits of their jurisdiction, but merely to know whether there be in fact such a record, it will be sufficient to certify the tenor that is, a literal transcript, of the record. (3) But where the record itself is the subject of the proceedings in the superior court, the original ought to be returned. (3)

When records are exemplified, the whole, in general, must be exemplified, for the construction is to be taken from a view of the whole together: and nothing but records can be proved by an exemplification. Private deeds, exemplified under the broad seal, will not be admitted in evidence: for as the deeds themselves are in the custody of the party, they ought to be produced, that the court may see whether there are any erasures or interlineations. (4)

2. The second sort of copies under seal are exemplifications of the records of a court under its own seal; and they also are considered to be of higher credit than sworn copies. The seal of the king, and of the public courts of justice, and of all courts established here by act of parliament, are admitted in evidence without extrinsic proof of their genuineness; as, for example, the seal of the county palatine of Chester (5),

(1) Luttrel v. Lea, Cro. Car. 297., Pitt v. Knight, 1 Saund. 98. Hewson v. Brown, 2 Burr. 1034.

(2) Butcher and Aldworth's case Cro. Eliz. 821. Guilliam v. Hardy, 1 Ld. Ray. 216.

(3) Woodcraft v. Kinaston, 2 Atk. 317.

(4) Bull. N. P. 227.

(5) Dyer, 276. cited in Olive v Gwin, 2 Sid. 146.

or of the great sessions of Wales (1), or the seal of the ecclesiastical court on an exemplification of a will. (2) But the seals of private courts, or of a foreign colonial court (3), or of a corporate body (4), ought to be proved by a witness acquainted with their impression. It is not, however, necessary to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness, who saw the seal affixed to the identical instrument; but when an instrument purports to be under the seal of a corporation, it will be sufficient to shew that the seal is the official seal of the corporate body. (5)

3. Copies of records, not under seal, are also of two kinds; sworn copies, and office copies. Copy of record.

Records are complete, as soon as they are delivered into court in parchment, and there fixed as the rolls of the court. Of these, a sworn copy will be sufficient evidence for a jury, unless the record itself is in issue. But the copy of a judgment signed by the master is not evidence, though upon such judgment execution may be taken out; for it is not yet become permanent, and is removable from place to place. (6)

Copies of records are to be proved as other transcripts, by a witness, who has compared the copy, line for line, with the original, or who has examined the copy, while another person read the original (7); and it ought to appear, that the original came from the proper place of deposit, or out of the hands of the officer, in whose custody the records were kept. (8) But when an ancient record has been lost, a copy may be read without proving it a true copy. Thus an unexamined

(1) Dyer, 276. cited in Olive v. Gwin, 2 Sid. 146. Hardr. 118. S.C. Gilb. Ev. 16.

(2) Kempton dem. Boyfield v. Cross, Rep. temp. Hard. 108.

(3) Henry v. Adey, 3 East, 221.

(4) Moises v. Thornton, 8 T. R. 307.

(5) 8 T. R. 307. In Woodmass v. Mason, 1 Esp. N. P. C. 53., it was held by Lord Kenyon, that the seal of the city of London proves itself.

(6) Bull. N. P. 228.

(7) Reid v. Margison, 1 Campb. 470. Rolf v. Dart, 2 Taunt. 52. M'Niel v. Perchard, 1 Esp. N. P. C. 263. Gyles v. Hill, 1 Campb. 471. n.

(8) Adamthwaite v. Synge, 1 Starkie, 183. 4 Campb. 372. S. C.

copy of a recovery of lands in ancient demesne has been received, where the original was lost, and where possession had gone for a long time according to the recovery. (1) And similar proof has been allowed of the decree in the time of Henry the Eighth for tithe in London, that decree having been lost. (2) In such cases, says Ch. B. Gilbert, the instrument must be, according to the rule of the civil law, vetustate temporis aut judiciariâ cognitione roboratum. (3)

Copy authenticated by officer.

It is a general rule, that a copy, authenticated by a person appointed for that purpose, is good evidence of the contents of the original, without any proof of its being an examined copy. The chirograph of a fine, for example, is evidence of the fine, the chirographer being appointed to give out copies of the agreements between the parties, which are entered of record. (4) An indorsement by the proper officer on a deed of bargain and sale, enrolled according to the form of the statute 27 H. 8. c. 16., is evidence of the enrolment (5): and an indorsement of the date of enrolment, by the clerk of the enrolments, is part of the record, and conclusive as to the date. (6) So, where it became necessary for the plaintiff to shew, in proof of his title, that a certain lease had been enrolled with the auditor of the Duchy of Lancaster, the Court of King's Bench held, that a memorandum of enrolment, on the margin of the lease, signed "A. B. auditor," was sufficient proof of the enrolment. (7) A rule of court under the hand of the proper officer is itself an original, and may be given in evidence in a legal proceeding in that court, without being proved a true copy. (8) So in a case where a witness, being about to leave the country, had been examined at a Judge's chambers, a copy of his depositions, delivered out by the clerk of the Judge, and attested by the clerk's signature,

(1) Anonym. case, Ventr. 257.
(2) Ventr. 257. Knight v. Dauler, Hardr. 323. Thurston v. Slatford, 1 Salk. 284., by Holt C. J.
(3) Gilb. Ev. 19.
(4) Ibid. 21. 2 Starkie, N. P. C. 13.
(5) By Buller J. in Kinnersley v. Orpe, 1 Doug. 56.
(6) The King in aid of Reed v. Hopper, 3 Price, 495. The same rule, with respect to the date of the enrolment of a memorial of annuity-deeds; Garrick v. Williams, 3 Taunt. 540.
(7) Kinnersley v. Orpe, 1 Doug. 56.
(8) Selby v. Harris, 1 Ld. Raym. 745.

was admitted in evidence, without proof of its being examined and compared with the original depositions. (1)

But where the officer of the court is only entrusted with the custody of records, and is not authorised to make out a copy, he has no more authority for that purpose than a common person; and the copy must be regularly proved in a strict and regular mode. Thus the office copies of depositions, though they are evidence in the Court of Chancery, where officers are intrusted for that purpose, will not be admitted in courts of common law, without examination with the roll. (2) So, where a fine is to be proved with proclamations, as it must be to bar a stranger, the proclamations ought to be examined with the roll; for though the chirographer is authorized to make out copies of the fine itself, he is not appointed to copy the proclamations. (3)

When a verdict is offered in evidence, as the opinion of a jury on certain points in issue, it will be necessary also to produce a copy of the judgment founded upon the verdict. The production of the postea alone is not sufficient; for it may happen that the judgment was arrested, or a new trial granted. (4) But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such a case; and here, therefore, the decree of the Court must be shewn, which will be a sufficient proof, that the verdict was satisfactory, and stands in force. (5) Verdict. Postea.

Though the nisi prius record, with the postea indorsed, is not generally evidence of the verdict, it is good and proper evidence that the cause came on to be tried. (6) And in an

(1) Duncan v. Scott, 1 Campb. 101.

(2) Gilb. Ev. 21. Bull. N. P. 229. 2 Starkie, N. P. C. 13.

(3) Gilb. Ev. 21. Allen's case, Bull. N. P. 229. 3 Taunt. 166.

(4) Bull. N. P. 234. Fisher v. Kitchingman, Willes, 367. Garland v. Scoones, 2 Esp. N. P. C. 647. contra.

(5) Montgomerie v. Clarke, at the Delegates, 1745. Bull. N. P. 234.

(6) Pitton v. Walter, 1 Str. 161. Fisher v. Kitchingman, Willes, 368. R. v. Page, 2 Esp. N. P. C. 649. n. 6 Esp. N. P. C. 83. S. C.

action by the plaintiff to recover a moiety of the money paid by him under a verdict, which a third person had received in a suit against him and the defendant, as co-defendants, the nisi prius record, with the postea indorsed, will be evidence of the verdict and damages in the former suit, without proof of the judgment. (1) In the case just cited, of Fisher v. Kitchingman, Willes C. J. doubted whether the associate was the proper person to produce the postea in evidence; because, by several rules of court, it ought to be returned into court to the proper officer within the four first days of the next term; but, on the prothonotaries informing the court, that scarcely one postea in a hundred was so returned, he was of opinion, that this objection was not of sufficient weight to set aside the verdict.

Writs.

When a writ is only inducement to the action, the fact of taking out the writ may be proved without a copy, because possibly the writ might not have been returned, and then it is not a record. But where the writ itself is the gist of the action, there ought to be a copy from the record, as the best proof of which the nature of the case is capable. (2) If it be necessary to prove that a writ issued in a particular cause, it will not be sufficient to prove the præcipe by the filazer's book, and, after proof of notice to produce the original, to give in evidence a copy of the writ; but a proper search must be proved to have been made at the Treasury for the original writ, before secondary evidence can be given. (3) An examined copy of the judgment-roll, containing the award of an elegit and return of the inquisition, is evidence, in an action for use and occupation, of the title of the plaintiff, who claims under the elegit, without proving a copy of the elegit and of the inquisition (4); the judgment-roll

(1) Foster v. Compton, 2 Starkie, 365. By Abbot C. J. The postea, in this case, with the Master's allocatur indorsed upon it, was offered also as evidence of the costs: The Lord Ch. Justice doubted, whether this was sufficient proof of the costs. The plaintiff, however, was allowed to take a verdict for the whole demand, subject to be reduced afterwards, if the court should think it right.

(2) Gilb. Ev. 34. Bull. N. P. 234.

(3) Edmonstone v. Plaisted, 4 Esp. N. P. C. 160.

(4) Ramsbottom v. Buckhurst, 2 Maule & Sel. 565.

is absolute proof of all the proceedings, which it sets forth.

If an action of trespass, for taking goods in execution, is brought by the party, against whom the writ of fieri facias issued, it will be sufficient for the officer to give the writ in evidence, without shewing a copy of the judgment. But if the plaintiff is not the party, against whom the suit issued, and claims the goods by a prior execution or sale, the officer, in order to prove the sale or the execution fraudulent, must produce not only the writ, but also a copy of the judgment. In the first case, he will justify himself, by proving that he took the goods in obedience to a writ issued against the plaintiff; but, in the other case, the goods do not primâ facie belong to the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within the statute 13 Eliz. c. 5. against fraudulent alienations, &c. for which purpose it will be necessary to shew a judgment. (1)

The return of the sheriff upon a writ, which has been duly returned and filed, is *primâ facie* evidence of the fact there stated, when that fact comes incidentally into question. If the sheriff return a rescue, the court above, to which the return was made, would give it such credit, as to issue an attachment in the first instance; though, upon an indictment for a rescue, the defendant might shew, that the return was false. (2) And so in an action for maliciously suing out an alias fieri facias, after a sufficient execution under the first fieri facias, the Court of King's Bench held, that the sheriff's return annexed to the writs (in which he stated, that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff,) had

(1) Lake v. Billers, 1 Ld. Ray. 733. Martin v. Podger, 2 Black. Rep. 701. Bull. N. P. 234. a.

(2) R. v. Elkins, 4 Burr. 2129. There are several cases, in which the indorsement on the writ has been admitted as evidence against the sheriff, who makes the return. Blatch v. Archer, Cowp. 63. M'Neil v. Perchard, 1 Esp. N. P. C. 263. Jones v. Wood, 3 Campb. 229. Fairlie v. Birch, 3 Campb. 397.

been properly admitted at the trial as evidence of that fact, in support of a plea of licence pleaded by the defendant; for, as the Court said, faith ought to be given to the official act of a public officer, like the sheriff, even where third persons are concerned. (1) But though the sheriff's return is *primâ facie* evidence that he has levied, it affords no proof that he has paid over the money to the judgment-creditor, so as to charge him in an action with the receipt. (2)

Inquisition

When an inquisition is offered in evidence, the commission, under which it was taken, ought regularly to be proved, or shewn to be lost. But in cases of more general concern, such as the minister's return to the commission in the reign of Hen. 8. for enquiring into the value of livings, a copy of the whole record need not be taken, and the commission is of such public notoriety as not to require any proof. (3)

Common recoveries.

It is enacted by statute 14 G. 2. c. 20. s. 4., (made for the purpose of protecting purchasers, in cases where recoveries have not been entered on record,) that where any person has purchased any estate, whereof a recovery was necessary to be suffered in order to complete the title, such person, and all claiming under him, having been in possession of the purchased estate from the time of the purchase, may, after the end of twenty years, produce in evidence the deed making a tenant to the writ of entry, or other writ for suffering a common recovery and declaring the uses, and the deed so produced, execution thereof being duly proved, shall in all courts be deemed good and sufficient evidence for the purchaser, and all claiming under him, that the recovery was duly suffered and perfected according to the purport of the deed, in case the record of recovery cannot be found, or should not appear to be regularly entered.

Decree in Chancery.

A decree in the Court of Chancery may be proved by an

(1) Gyfford v. Woodgate, 11 East, 297.

(2) Cator v. Stokes, 1 Maul.&Sel. 599.

(3) Bull. N. P. 228. Hardcastle v. Sclater, 2 Gwill. 787.

exemplification under the seal of the Court; or by a sworn copy; or by a decretal order in paper, with proof of the bill and answer. (1) But it has been held, that the bill and answer need not be proved, if they are recited in the decretal order. (2) And it is said in a book of authority (3), "that, if a party wants to avail himself of the decree only, and not of the answer, the decree, under the seal of the court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to shew, that the point in issue was not the same as the present issue." However, the rule, generally laid down, seems to be, that, where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as, that a decree was made by the court,) he ought regularly to give in evidence the proceedings upon which the decree is founded. "The whole record," says Ch. B. Comyns, "which concerns the matter in question, ought to be produced." (4) So, "a sentence in the Admiralty Court may be evidence, upon the libel and answer produced; and a judgment in a court baron, or other inferior court, with proof of the proceedings in which the judgment was given." (5) If, indeed the fact to be shewn were merely that a decree has been made in the Court of Chancery, or that a decree, made there, has been reversed on appeal, proof of the previous proceedings will not be necessary. (6)

An answer cannot be regularly given in evidence without proof of the bill; for without the bill there does not appear to be a cause depending. But if there be proof by the proper officer, that the bill has been searched for in the office, and cannot be found, the answer has been allowed to be read without a sight of the bill. (7) As the defence in Chancery is Answer.

(1) Trowel v. Castle, 1 Keb. 21. Com. Dig. Ev. (C 1.) p. 94.

(2) By Trevor C. J. in Wheeler v. Lowth, cited Com. Dig. ib. 1 Keb. 21. contra.

(3) Bull. N. P. 235. citing Lord Thanet v. Paterson, K. B. East. 12 G. 2.

(4) Com. Dig. tit. Evid. (A 4.) p. 85.

(5) Com. Dig. ib. (C. 1.) p. 94.

(6) See Jones v. Randall, Cowp. 17.

(7) Gilb. Ev. 49.

upon oath, it will be presumed in ordinary cases, that the answer was sworn to by the defendant.

When an answer is offered in evidence as an admission of the party upon oath, it will be sufficiently proved by an examined copy (1); nor will it be necessary to show, that there has been any decree in the suit. (2) If an examined copy is given in evidence, some proof of the identity of the party will be requisite; and this may be supplied by extrinsic proof, or by the proceedings themselves. In one case the attorney of the party was called, to prove that the other party had filed the bill in equity against his client. (3) In another case, in which the action was brought against the defendant A. B. as administrator of C. D., and the defendant did not plead that he was not administrator, it appeared that the bill in equity had been also filed against A. B. as administrator of C. D., and this was considered to be sufficient presumptive evidence, that the answer, purporting to be made by A. B. in that character, was the answer of the defendant. (4)

Stricter proof than an examined copy is required, on a prosecution for perjury alleged to have been committed by the defendant in his answer. Some evidence of the administration of the oath will there be required; as, that a person, calling himself by the defendant's name, was sworn, and that the signature on the answer, which must be produced, is his hand-writing; or, that the answer is signed by the defendant, and that the jurat, purporting to have been sworn before a master, is attested by the master's hand-writing. (5) This strictness of proof is required not only in criminal proceedings, as on a trial for perjury, but also in actions which are in the nature of a criminal proceeding, as in an action for a malicious prosecution. (6)

Depositions. With regard to depositions, the general rule is that they

(1) Lady Dartmouth v. Roberts, 16 East, 334. Salter v. Turner, 2 Campb. 87. 3 Campb. 401.
(2) Lady Dartmouth v. Roberts, 16 East, 334.
(3) Hodgkinson v. Willis, 3 Campb. 401.
(4) Hennell v. Lyon, 1 Barn. Ald. 182.
(5) R. v. Morris, 2 Burr. 1189. R. v. Benson, 2 Campb. 508.
(6) 16 East, 340.

are not to be admitted in evidence without proof of the bill and answer (1); for, if there do not appear to be a cause depending, the depositions are considered to be mere voluntary affidavits; and the bill and answer ought to be produced, in order to shew, who were the parties to the suit, and what the points in issue, as depositions in general are evidence only upon the same points, and between the same parties, or those who claim under the parties. (2) But depositions may be read without such antecedent proof, if they are so ancient, that no bill or answer can be forthcoming; formerly it was not the practice to enroll bills and answers. (3) And if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego, the depositions may then be read, after proving the bill, although no answer has been put in. (4) Depositions are evidence, as an admission, against a party to the suit—or for the purpose of contradicting a witness—without proof of the bill and answer: but some proof of the identity of the person will be necessary.

Depositions taken on interrogatories, under a commission of modern date, are not admissible without the production of the commission, under the authority of which the depositions were taken: if the depositions are of a long standing, so that the commission may be presumed to have been lost, they are evidence by themselves: in either case, whether the depositions are of a recent or ancient date, there is no occasion to produce the bill and answer. (5)

Where the Court of Chancery, on directing a trial at aw, makes an order, that the depositions of a witness shall be read,

(1) Gilb. Ev. 56. Bull. N. P. 240. Nightingale v. Devisme, 5 Burr. 2594. ad fin. Baker v. Sweet, Bunb. 91. Illingworth v. Leigh, 4 Gwill. 1619. At the trial of the last-cited case, Mr. Just. Heath refused to admit depositions in evidence, because the bill and answer had not been duly proved, nor enquired after. But it is said by the reporter, that the rejection of this evidence was one of the grounds, upon which a new trial was afterwards granted. And see Byam v. Booth, 2 Price, 234. n.

(2) See ante, p. 361.

(3) Byam v. Booth, 2 Price, 234. n. Gilb. Ev. 58.

(4) Cazenove and another v. Vaughan, 1 Maule & Selw. 4.

(5) Baglie v. Wylie, 6 Esp. 85.

the proof of the bill and answer will be dispensed with. This order is not made for the purpose of making that admissible in evidence, which is not strictly admissible in courts of common law (1); and the depositions cannot be admitted, even under the order, unless it be satisfactorily proved at the time of the trial, that the witnesses are unable to attend in person. If depositions were offered in evidence without such an order, the whole record, bill, answer, &c. must be regularly proved; but when there is an order for reading depositions, the court of law will read them, without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. (2)

The proof of depositions is by an examined copy. Office copies are evidence in the Court of Chancery, but not in courts of common law, for a reason before-mentioned. (3)

Judgment in House of Lords.

Judgments in the House of Lords are not formally drawn up, but minutes only are entered on the Journals. The minutes of a judgment are the judgment itself; and they may be proved by an examined copy. (4)

Proceedings in inferior courts.

When the judgment of a court baron, or of any other court of inferior jurisdiction, is offered in evidence, the proceedings, on which it is founded, ought to be shewn (5); but as the record is not usually made up in form, the minutes of their proceedings will be admitted if they are perfect, and omit nothing material. (6)

Probate of wills.

Testaments are proved in the ecclesiastical court either in common form, or in form of law. The first mode of proof is where the executor presents the will before the Judge, without citing the parties interested, and deposes that it is the true and last will of the testator; upon which, the Judge allows

(1) See ante, p. 360.

(2) Palmer v. Ld. Aylesbury, 15 Ves. 176. Corbett v. Corbett, 1 Ves. & Beam. 340.

(3) See ante, p. 389.

(4) Jones v. Randall, Cowp. 17.

(5) See ante, p. 381.

(6) Fisher v. Lane, 2 Black Rep. 834. Holt C. J. in R. v. Hains, Comberb. 337.

the will. The proof in form of law is, when the will is exhibited before the Judge in presence of the parties interested, and after a full examination is finally allowed. (1) If the will be proved in common form, it may be disputed at any time within thirty years; but if it be proved in the more formal mode, and there be no proceedings within the time limited for appeals, the will cannot afterwards be disputed. (1) After proof of the will, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him, which copy and certificate are the probate. A court of common law will not take notice of a will as a title to personal property, till it is proved in the Ecclesiastical Court (2); and though the original will, together with the probate, is produced by the officer of the Ecclesiastical Court, the will cannot be read in evidence, unless it bears the seal of the Court or some other mark of authentication. (3)

It is not the practice in the ecclesiastical courts to grant a second probate, if the first should be lost, but only to grant an exemplification from the record of the court, and this exemplification will be evidence of the proof of the will. (4) And an examined copy of the probate is evidence of the person there named being executor, as the probate is an original taken by authority, and of a public nature (5); but a copy of the will would not be evidence of that fact. (6)

The probate of a will, devising real property, is not evidence of the contents, in an action of ejectment, even to prove a relationship; for where the original is in being, the copy is not admissible; and, besides, the seal of the court does not prove it a true copy, unless the suit relate only to personal

(1) 3 Bac. Ab. 40. tit. Executor.
(2) Stone v. Forsyth, 2 Doug. 707.
(3) R. v. Barnes, 1 Starkie, 243.
(4) Shepherd v. Shorthouse, 1 Str. 412. Bull. N. P. 246.
(5) Hoe v. Nelthorp, 3 Salk. 154. 1 Ld. Raym. 154. S. C. Holt C. J. in R. v. Haynes, Skin. 584. See ante, p. 336.
(6) Bull. N. P. 246. See 1 Broderip & Bingham's Rep. C. P. 219.

property. (1) But the ledger-book, says Mr. Justice Buller, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove relationship, the rolls of the spiritual court which has authority to enroll wills, are sufficient proof of such testament. And, under particular circumstances, the ledger-book may be evidence even in a devise of a real estate; as where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, (that belonging to the devisee of the land,) the ordinary's register of the will, and proof of former payments, were held to be sufficient evidence against the plaintiff, who was devisee of the land charged. However, in such a case, notice ought to be given to the other party to produce the will. It has been often held, that a copy of the ledger-book is not evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit, says Mr. Justice Buller, that the copy should also be read. The contrary practice, he adds, has been founded upon the mistaken supposition, that the ledger-book is read as a copy, when in fact it is read as a roll of the court. (1)

To prove that the probate of a will has been revoked, an entry of the revocation in a book of the prerogative court, in which all causes were entered by the registrar, and which was kept as the only record of such proceedings and of the decree of the court, has been admitted to be good evidence. (2)

Letters of administration. Administration is generally granted by writing under seal. It may also be granted by entry in the registry without letters under seal. (3) The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore, when a lessee pleads an assignment of a term from an administrator, such

(1) Bull. N. P. 246.
(2) Ramsbottom's case, 1 Leach, 70. Cr. C. 30. n. (c)
(3) Vin. Ab. Executor, D. p.

certificate is good evidence. (1) And the original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves, notwithstanding subsequent letters of administration granted to another, if the first are not recalled; for the original book was the authority for the proper officer to make out letters of administration, and the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner. (2) So an examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. (3)

In an action upon the judgment of a court of a foreign country, the sentence must be proved by proving the hand-writing of the Judge of the court, who subscribed it, and the authenticity of the seal affixed. Thus, in a late case (4), the plaintiff, who sued here on a judgment obtained in the island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island. And on a motion to set aside the nonsuit, the court said, they could not take official notice, that the seal affixed was the seal of the island, which was necessary to be shewn, in order to prove the judgment, which it purported to authenticate; and that proving the Judge's hand-writing could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. If a colonial court possess a seal, it ought to be used for the purpose of authenticating its judgments, although it may be so much worn as no longer to make any impression. (5) If it is clearly proved, that the court

Foreign judgment.

(1) Kempton dem. Boyfield v. Cross, Rep. temp. Hard. 108. Bull. N. P. 246.

(2) Elden v. Keddell, 8 East, 187. Garrett v. Lister, 1 Lev. 25. Bull. N. P. 246. 2 Maule & Selw. 567.

(3) Davis v. Williams, 13 East, 232. Ray v. Clark, ib. 238. n. (a)

(4) Henry v. Adey, 3 East, 221. Buchanan v. Rucker, 1 Campb. 63. Flindt v. Atkins, 3 Campb. 215.

(5) Cavan v. Stewart, 1 Stark. 525.

has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shewn to possess some other requisite to entitle it to credit (1); as, by proving the signature of the judge upon the judgment. (2) An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the Court, is evidence of the judgment in the courts of this country (3); but a document purporting to be a copy of a judgment, made by the officer of the court, is not admissible. (4)

Award.

The effect of an award has been before mentioned. (5) In an action upon an award, it will be necessary to prove both the submission and the execution of the award. And, in general, whether the validity of the award comes into question directly, or only incidentally, the submission of all the parties ought to be regularly proved. Thus, where there had been a deed of reference, between a creditor and several partners, of all copartnership accounts and of all matters in difference between the parties or any two of them, and an action of trover was afterwards brought by the creditor, the assignee under a commission of bankruptcy of one of the partners, (in which action the plaintiff produced the award and deed of reference, as evidence of a separate debt due to him from the bankrupt,) the Court of King's Bench held, that it was indispensably necessary to prove the execution of the deed by all the parties: for this was a reference of the aggregate accounts between all and each of the partners, and the consideration to each for entering into the submission was, that each party's account should be liquidated, not only as to one, but as to all; the accession of all therefore ought to be proved; and, without such proof, the arbitrator would not appear to have competent authority to decide the whole question between the parties. (6)

(1) 2 Starkie, 11.

(2) Alves v. Bunbury, 4 Campb. 28.

(3) 2 Starkie, N. P. C. 11, 12. by Lord Ellenborough and Bayley J.

(4) Appleton v. Lord Braybrook, 2 Starkie, 6, 7.

(5) See ante, p. 381.

(6) Antram v. Chace, 15 East, 209.

If the award, given in evidence, is the award of commissioners under an act of parliament, the act ought to be produced, for the purpose of shewing the authority of the commissioners, and that the award is conformable with the provisions of the statute, and, if the act is a private act, it must be regularly proved. (1) If previous notices are required to be given, before the commissioners make their award, proof of the regularity of such notices will not in ordinary cases be necessary. But if the circumstances of the case raise a presumption, that all has not been regularly performed, then it will be incumbent on the party to prove the due performance. Thus on the trial of an indictment against a parish for not repairing a highway, which was reputed to lie within the parish, and had been from time to time repaired by the inhabitants, an award made by commissioners of inclosure, awarding the highway to be situate in a different parish, was adjudged not to be admissible evidence for the defendants, because it was not proved, that the commissioners had given the previous notices, required by the inclosure act, to the parishes, who would be affected by their award; the circumstance of the defendants having continued to repair after the award, raised a presumption, that there had not been such a notice as the act of parliament required. (2)

(1) See ante, p. 585

(2) R. v. Inhabitants of Haslingfield, 2 Maule & Selw. 558.

CHAP. VI.

Of Public Writings, not Judicial.

THE next species of evidence, which our subject leads us to consider, relates to such public writings as are not judicial. In treating of this part of the subject, it will only be necessary to mention some of the principal documents of this description; after which we shall proceed to enquire, how a party, who wishes to use public writings in evidence, may obtain an inspection.

Domesday-book.

The most ancient public document in the kingdom, is Domesday-book, consisting of two volumes, kept in the receipt of the Exchequer. They contain a general survey of all the counties in England, excepting the four northern, and were compiled soon after the Conquest for the purpose of ascertaining the ancient demesne lands, which were the socage tenures first in the hands of Edward the Confessor, and afterwards of William the Conqueror. This has been always considered a book of the greatest authority; and if a question should at any time arise, whether a manor is ancient demesne, the trial is by inspection of Domesday-book. (1) These volumes have of late years been printed at the expense of government, in consequence of an address from the House of Lords; and the work is said to be executed with the most scrupulous fidelity and correctness. (2) Another ancient survey, which ascertains the extent of the king's ports, is also deposited in the Exchequer. (3) These surveys are recognized and treated as authentic documents in courts of justice, having been made by the authority and order of the government of the country, on public occasions, and on subjects of public interest.

Surveys of ecclesiastical benefices.

The Valor Beneficiorum, or Pope Nicholas's Taxation, is another document of a public nature. In the year 1288, Pope Nicholas the Fourth, to whose predecessors in the see of Rome the first fruits and tenths of all ecclesiastical benefices had for a long time been paid, granted the tenths to King Edward the First for six years, towards defraying the expense of an expedition to the Holy Land; and, that they might be collected to their full value, a taxation by the king's precept was begun in that year, and finished for the province of Canterbury in the year 1291, or the 20th year of the reign of Edward the First; and for that of York in the following year; the whole being under the direction of the Bishops of Winton and Lincoln. (4) This taxation of Pope Nicholas is an im-

(1) Hob. 188. Gilb. Ev. 69.

(2) First Report of H. of Commons, on Public Records, Appendix, A. 1 a.

(3) Gilb. Ev. 69.

(4) See first Report of H. of Commons on the Public Records, p. 15.

portant document, because all the taxes, as well those paid to our kings as those to the Pope, were regulated by it, till the survey made in the twenty-sixth year of Henry VIII.; and because the statutes of colleges, which were founded before the Reformation, are also interpreted by this criterion, according to which their benefices under a certain value are exempted from the restriction in the statute of the twenty-first of Henry VIII. concerning pluralities. (1) The taxation is evidence of the rate and value, at which the persons, employed in that taxation, thought fit at that time to estimate the living. (2) The original is kept in the office of the king's remembrancer in the Exchequer.

A new Valor Beneficiorum was instituted in the twenty-sixth year of Henry VIII., when the first fruits and tenths of every ecclesiastical promotion were annexed to the revenue of the crown. (3) To ascertain their value, ecclesiastical surveys were taken, by virtue of commissions in the king's name issuing under the great seal (4); and these surveys are admitted as evidence of their amount at that period, although they are generally considered as estimating the value much too low. (5) Upon the same principle, surveys of the possessions of religious houses, previous to the dissolution of the monasteries, are received in evidence. (6) These surveys are admissible, although the commissions, under which they were taken, are not to be found. (7)

Surveys of the church and crown lands were taken by commissioners in the time of the commonwealth, under the authority of acts or ordinances of the parliament; and copies of these surveys were deposited in many of the cathedrals. The originals would have been good evidence of the particulars of the surveyed estates, upon the same principle as

(1) Humphreys v. Knight, Cro. Car. 455. 2 Lutw. 1305. Stump v. Ayliffe, 2 Gwill. 536.
(2) By Ld. Redesdale, Bullen v. Michel, 2 Price, 477.
(3) St. 26 H. 8. c. 3.
(4) Sect. 3 & 10.
(5) 3 Gwill. 856. 1240. 4 Price, 221. 5 Price, 577.
(6) Vicar of Kellington v. Trin. Coll. Cambridge, 1 Wils. 170.
(7) See (6), and Bagshaw v. Bp. of Bangor, cited in Underhill v. Durham, 2 Gwill. 542.

the other public surveys, which have been before mentioned, but as they were destroyed at the time of the great fire in London, the copies have been admitted, as evidence, in the place of the original surveys, provided they have been kept in unsuspected repositories. (1) The parliamentary surveys have the credit of being taken with extreme accuracy and minuteness. The circumstance, therefore, of these surveys being silent as to a supposed modus, has been considered to be strong evidence against its existence. (2)

Journals of parliament.

The Journals of the Lords or Commons are evidence of their proceedings. An entry in the Journals of the House of Lords, stating that a judgment below has been reversed, is evidence of the fact of reversal (3); and the Journals have been admitted to prove an address from the House of Lords to the King, and the answer of the King. (4) Thus, the address of the Lords to the King, and the King's answer, proved by the Journals, have been admitted as evidence of an averment in an information, that certain differences had existed between the King of England and the King of Spain. Here, it is to be observed, the fact related purely to a matter of state, and therefore admitted of this kind of proof. But a resolution of either House is not evidence of the truth of facts there affirmed; and therefore in the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the popish plot, a resolution in the Journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. (5)

Gazettes.

The public acts of government, and acts by the king in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown: and of such acts

(1) Underhill v. Durham, 2 Gwill. 542. Green v. Pronde, 1 Mod. 117 Bullen v. Michel, 4 Dow. 325. 2 Price, 399. S. C.

(2) 11 East, 284. 1 Maul. & Selw. 294.

(3) Jones v. Randall, Cowp. 17.

(4) Franklin's case, 9 St. Tr. 259. cited by Buller J. 5 T.R. 446. And see the case of the Seven Bishops, 4 St. Tr. 376.

(5) 4 St. Tr. 39.

announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence. A proclamation for reprisals, published in the Gazette, is evidence of an existing war.* Proclamations for a public peace, or for the performance of quarantine, and any acts done by or to the king in his regal character, may be proved in this manner (1); and, upon the same principle, articles of war purporting to be printed by the king's printer, are allowed to be evidence of such articles. (2) A Gazette, in which it was stated, that certain addresses had been presented to the king, has been adjudged to be proper evidence, to prove an averment of that fact in an information for a libel (3); for they are addresses, said Lord Kenyon, of different bodies of the King's subjects, received by the king in his public capacity, and they thus become acts of state. And in the late case of the King v. Sutton (4), the Court of King's Bench determined, that the king's proclamation, (which recited, that it had been represented, that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders,) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrages of that particular description had been committed in those parts of the country.

Gazettes are not evidence of private titles or private inte-

(1) 5 T. R. 436. 443. Quelch's case, 8 St. Tr. 212.
(2) R. v. Withers, cited by Buller J. 5. T. R. 446. See stat. 55 G. 3 c. 108. s. 56.
(3) R. v. Holt, 5 T. R. 436.
(4) 4 Maule & Selw. 546.

* Public notoriety is sufficient evidence of the existence of a war. Foster, Disc. ch. 2. s. 12. p. 219. Evidence, therefore, was not produced to prove this fact, though averred in the indictment, in the cases of Sir John Friend, of Sir W. Parkyn, Cook's case, and Vaughan's case, which are reported in the State Trials. A declaration of war by a foreign government, transmitted to this country by the English ambassador, and produced from the Secretary of State's office, has been admitted as evidence of the commencement of hostilities between that government and another state. Thelluson v. Cosling, 4 Esp. N. P. C. 266.

rests, as of a presentation, or of a grant by the king to an individual, which have no reference to the affairs of government; nor is a Gazette evidence to prove an appointment to a commission in the army. (1)

Notices relating to bankruptcies are constantly inserted in the Gazette; and they are made sufficient by act of parliament. Notices, also, of the dissolution of partnerships, are very commonly inserted. An advertisement in the Gazette, announcing a dissolution, has been admitted as evidence of a public notification of that fact; but such evidence is of little avail, unless it be shewn, that the party, entitled to notice, was in the habit of reading the Gazette. (2) And such an advertisement in a common newspaper, is not even admissible, without proof that the party took in that paper. (3) If the paper, containing the advertisement, is proved to have been read by the party, or if it is proved only to have been delivered in the usual course at the house of the party, the jury may reasonably be instructed to consider, whether the attention of a tradesman, in reading a newspaper, was not likely to be attracted by notices of the dissolution of partnerships, to which the attention of others might not be directed: and it is a question for the jury to determine, whether, under all the circumstances of the case, the party had actually received notice of the dissolution. (4)

Parish registers.

Parish registers are evidence of births, marriages, and burials. Registers are directed to be kept as public books, and are accompanied with all the means of authenticity. "They are in the nature of records," said Lord Mansfield, "and need not be produced, or proved by subscribing witnesses." (5)

(1) Kirwan v. Cockburn, 5 Esp. N.P.C. 233. R. v. Gardner, 2 Camph. 513.

(2) Godfrey v. Turnbull and Macaulay, 1 Esp. N. P. C. 371. Peake, N. P. C. 155. n. S. C. Leeson v. Holt and others, 1 Starkie, 186.—See also Graham v. Hope, Peake, N. P. C. 154. Gorham v. Thompson, Ib. 42.

(3) 1 Starkie, 186.

(4) Jenkins v. Blizard and another, 1 Starkie, 420.

(5) Birt v. Barlow, 1 Doug. 173.—A book, entitled The Parish Register, produced from a chest in the vicarage house, and containing ancient entries respecting tithes due to the vicar, one of which entries purported to be made about 150 years ago by the vicar of that time, was admitted in evidence, on a question of tithes between a succeeding vicar and occupiers of the parish, in the case of Drake v. Smyth and others before the Lord Chief Baron. 5 Price, 369. 372. 377.

To prove a marriage, for instance, an examined copy of an entry is sufficient; this is proof of a marriage at a certain time, between two parties describing themselves by the names and places of abode there mentioned.

The keeping of registers for entries of births and christenings commenced in the thirtieth year of the reign of Henry VIII., and was afterwards enforced by injunctions from Edward VI., and from Elizabeth (1); and the marriage act (2), after directing registers to be kept as public books in every parish, for the purpose of registering marriages, enacts, that "immediately after the celebration of every marriage, an entry thereof shall be made in such register; in which entry or register it shall be expressed, that the marriage was celebrated by banns or licence; and if both, or either of the parties married by licence be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition; and also by the parties married, and attested by two credible witnesses." By the canons of 1603 copies of parish registers in every diocese ought to be regularly transmitted once in every year to the diocesan or his chancellor (3); a regulation extremely important, for the purpose of guarding the evidences of title and pedigree, but which has been so generally neglected, as to make it necessary for the legislature to interpose, and pass an act for their better preservation. It is by this statute enacted (4), that copies of the register books, verified by the officiating minister of the parish, shall be transmitted annually by the churchwardens, after they or one of them shall have signed the same, to the registrars of the diocese within which the church is situated.

An entry of marriage in the parish register, made in the form prescribed by the act of parliament, is evidence, that the persons therein named were married, on the day specified, by banns or licence, as the case may be. Such an entry is not

(1) 3 Burn. Eccl. L. 275. Gilb. Ev. 68.

(2) St. 26 G. 2. c. 33. s. 14.

(3) Can. 70. Gibson's Codex, p. 204.

(4) Stat. 52 G. 3. c. 146. s. 7

essential to the validity of a marriage; so that, if it has not been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must therefore be established by some other medium of proof. In order to prove, that the parties, described in the register, are the same parties, whose marriage is in question, it must obviously be unnecessary to call either of the subscribing witnesses to the register; any evidence, which satisfies the jury concerning their identity, must be sufficient; as, by proof of the similarity of their hand-writing, or that the bell-ringers, were paid by them for ringing after the marriage, or by proof of other circumstances to ascertain the persons. (1)

A book of Fleet marriages cannot be read as a register, not having been compiled under public authority, and is not legal evidence of a marriage. (2) A copy of a register of baptism, kept in the island of Guernsey, is not admissible in our courts of law (3); nor is the copy of a register of a foreign chapel admitted here as proof of a marriage abroad. (4)

Registers of ships.

Public registers are required by act of parliament to be kept for the registering of ships (5); and the register and certificate of register are conclusive evidence of want of title, against those who are not named in the register. Thus, in an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, two only of whom were named as owners in the register, it was decided, that the action could not be maintained, although it was proved as a fact, that the ship had been paid for by all the four partners: for as the plaintiffs claimed the freight only in right of ownership, they could not recover without proving that right; and it appeared conclusively from the register that all the four partners had not a legal title to the ship. (6)

(1) Bull. N. P. 27.

(2) Reed v. Passer, Peake, N. P. C. 231. Lloyd v. Passingham, 1 Cooper, Ch. C. 155.

(3) Huet v. Le Mesurier, 1 Cox. Cas. 275.

(4) Leader v. Barry, 1 Esp. N. P. C. 353.

(5) St. 26 G. 3. c. 60. St. 34 G. 3. c. 68. The reader is referred, on this subject, to Mr. Abbott's treatise on Shipping, ch. 2. p. 27.

(6) Camden v. Anderson, 5 T. R. 709. 14 East, 229. Marsh v. Robinson, 4 Esp. 98.

The register of a ship, then, is conclusive evidence, that persons, who are not there named as owners, cannot legally be joint-owners; but the converse of the rule is not true, namely, that all persons, who are named as owners in the register, are liable as such. Such registers are not recognised as public documents to prove the ownership; and they are not evidence to fix the parties therein named as owners, in actions against them, unless they are shewn to have been made by their assent or recognised by them. This point was decided in the case of Tinkler v. Walpole (1); which was an action for goods sold and delivered for the use of a ship, against the defendant as one of the owners. At the trial of the cause, in order to prove the ownership of the defendant, two registers were offered in evidence, purporting to have been made on the oaths of the managing owner, who gave the order for the goods, and of two other part-owners, swearing that they and others named, including the defendant, were owners of the ship; and it was insisted that these registers, on account of their authenticity as public documents, required for public purposes, and obtained under the sanction of an oath, ought to be considered at least primâ facie evidence to prove the defendant a part-owner. But Lord Ellenborough C. J. who tried the cause, ruled that the evidence was not admissible, unless it could be shewn that the defendant had assented to the register, or at least had recognised it. And this opinion was afterwards confirmed by the other Judges of the court. On that occasion Lord Ellenborough expressed himself in the following terms: "Notwithstanding the practice may have prevailed for a long time to receive ships' registers, as evidence of the property being in the persons therein named, yet when we are brought to consider the admissibility of such evidence against the defendant, in a case, where he has done no act to adopt the register as having been made by

(1) 14 East, 226. Cooper v. South and others, 4 Taunt. 802. Smith v Fuge, 3 Campb. 456. Fraser v. Hopkins, 2 Taunt. 5. 2 Campb. 170. S. C. Teed v. Martin, 4 Campb. 90. Upon the same principle, an entry in books, kept in the office for licensing stage-coaches, is not any proof, that persons named in the licence are owners of a coach. Strother v. Willan, 4 Campb. 24.

hit authority, we cannot give effect to it, without saying that a party may have a burthensome charge thrown upon him by the act of a third person, without his own assent or privity. If it had appeared, that the defendant, by any act of his own, had recognised the register, he would have been liable to all the consequences as a part-owner, which it describes him to be; but here he has done no act to adopt it. His partner has indeed dealt with the property, as if the defendant were a part-owner, by registering the ship in his name; but the act of a third person, without some act of the defendant to recognize it, cannot throw upon him a burthen, without violating the plain rule of law."

Upon the same principle, a register is not of itself evidence of a joint-ownership, in support of the defendant's plea, that other persons there named are jointly liable with him (1); nor is it evidence, that the ship is British-built, as there described. (2) So, in an action brought by the plaintiff as agent, on a policy of insurance, the register is not evidence to prove an averment, that the interest in the ship is in the persons there described. (3) The legislature has made the registration necessary to complete a title, but this does not make it of itself proof of the title. Property in a ship may be proved now, as it was proved before the acts of parliament relating to registers; as, for example, by proof of acts of ownership, or by proving actual possession in the party, or in those to whom he has committed it, or in those from whom he has himself derived his title. Any one of these media of proof is sufficient *primâ facie* evidence of ownership, without the aid of documentary proof or of title-deeds. (4)

Rate-books.

It is enacted by st. 17 G. 2. c. 38. s. 14. that true copies of

(1) Flower v. Young, 3 Campb. 240.

(2) Reusse v. Meyers, 3 Campb. 475.

(3) Pirie v. Anderson, 4 Taunt. 652.

(4) 4 Taunt. 657. Robertson v. French, 4 East, 136. Hubbard v. Johnstone, 3 Taunt. 177. 203.

all rates and assessments, made for the relief of the poor, be entered in a book to be provided for that purpose by the churchwardens and overseers of the poor of every parish, &c. who shall take care, that such copies be entered accordingly within fourteen days after all appeals from such rates are determined, and shall attest the same by putting their names thereto; and every such book shall be carefully preserved by the churchwarden, &c. for the time being, or one of them, in some public place, in every such parish, &c. whereto all persons assessed or liable to be assessed may freely resort, and shall be delivered over from time to time to the new and succeeding churchwardens, &c. as soon as they enter into their offices, and shall be produced by them at the general or quarter sessions, when any appeal is to be heard or determined.

Book for parish indentures.

The stat. 42 G. 3. c. 46. enacts, that the overseers of the poor of every parish shall provide and keep a book at the expense of the parish, and enter therein the name of every child, who shall be bound out by them respectively as an apprentice, together with the several other particulars, in the manner and form required by this act; and every such entry shall be produced and laid before the two justices of the peace, who shall signify their assent to the indenture of apprenticeship, at the time when such indenture shall be laid before them for that purpose, and each entry shall, if approved of, be signed by them according to the prescribed form. And in the third section it is enacted, that any person may at all seasonable hours inspect such book in the hands of the said overseer, and take a copy of such entry; and every such book shall be deemed to be sufficient evidence in all courts of law in proof of the existence of such indentures, and also of the several particulars specified in the register respecting such indentures, in case it shall be proved to the satisfaction of the court, that the indentures are lost or destroyed.



Books in public offices, &c.

The register of the navy-office has been admitted in evi-

dence, to prove the death of a sailor (1); the book from the master's office in the Court of King's Bench, to prove a person one of the attornies of that court (2); and the log-book of a man of war, which convoyed a fleet, to prove the time of the convoy's sailing. (3) Bank-books are good evidence to prove the transfer of stock (4); and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence to support an allegation in the indictment, that he was duly elected treasurer. (5) So, in an action for disturbing the use of a pew in a church, an old entry in the vestry-book, stating that the pew had been repaired by the then owner of a messuage (under whom the plaintiff claimed), has been admitted as evidence of his right; being made by the churchwardens on a subject within the scope of their official authority, and as showing the reputation in the parish respecting the right. (6)

The day-book of a public prison, containing a narrative of the transactions of the prison, has been received upon the same principle, as proof of the time of a prisoner's commitment or discharge (7): but it would not be admissible to prove the cause of his commitment. (8) The distinction between these cases is, that in the former there was no document besides the one produced, and no other evidence of the fact in question could be given, except perhaps the parol testimony of some person, who might have happened to be in prison at the time; but in the last case, the committitur, from which the entry was inserted in the book, might have been

(1) Bull. N. P. 249. Rhodes's case, 1 Leach. Cr. C. 29. Wallace v. Cook, 5 Esp. N. P. C. 117. See Barber v. Holmes, 3 Esp. N. P. C. 190.

(2) R. v. Crossley, 2 Esp. N. P. C. 524.

(3) D'Israeli v. Jowett, 1 Esp. N. P. C. 427.

(4) Breton Cope, Peake, N. P. C. 30. Marsh v. Colnet, 2 Esp. N. P. C. 665.

(5) R. v. Martin, 2 Campb. 100.

(6) Price v. Littlewood, 3 Campb. 288.

(7) R. v. Aickles, 1 Leach, Cr. C. 476.

(8) Salter and others v. Thomas, 3 Bos. & Pull. 188.

produced, and that would have been better evidence of the cause of commitment.

An entry in the book kept at Lloyd's, stating the capture of a ship, is evidence of that fact, though it is not a sufficient notice of it to the defendant, so as to make him liable on a policy of insurance, by which it was agreed that the loss should be adjusted within a certain time after advice of the capture. (1) The poll-books taken at an election for members of parliament, or at the election of a mayor, are admissible in evidence. (2) A copy of an official paper, containing an account of the cargo of a ship, made in pursuance of an act of parliament by an officer of the customs, and lodged there as an official document, has been admitted as proof that property was put on board. (3) A book in the office of secretary of bankrupts, containing entries of the allowance of certificates, kept by order of the Chancellor, and recognized by him as an official document, would be good secondary evidence of the allowance of a certificate; but a book containing such entries is not admissible, if it appear to be kept merely as the private memorandum of the clerks, without any authority or sanction from the Chancellor. (4) A book, in which leases were enrolled, and which was kept in the office of the auditor of the Bishop of Durham, has been held to be admissible evidence of a lease, after proof of the loss of the original and the counterpart: in the case alluded to, it appeared that the office was conducted like a public office, and the officer appointed by patent, and that the practice had been to enroll leases: the enrolment book was therefore considered as a public instrument, and presumed to exhibit a correct copy. (5)

In the above-cited case of the King v. Aickles (6), the clerk of the papers of the prison produced a daily book, kept by

(1) Abel v. Potts, 3 Esp. N. P. C. 242.

(2) Mead v. Robinson, Willes, 421. R. v. Hughes, cited, ib.

(3) Johnson v. Ward, 6 Esp. N. P. C. 47. The official paper was proved to have gone with the ship.

(4) Henry v. Leigh, 3 Campb. 499. R. v. Grimwood, 1 Price, 371.; excise books admissible.

(5) Humble v. Hunt, Holt, N. P. C. 601.

(6) 1 Leach, Cr. C. 436.

him, containing entries of the names of all the debtors and criminals brought into prison, and of the times when they were discharged; but it appeared that these entries were not made by the clerk on his own knowledge of the facts, but generally from the information of the turnkeys, and frequently from the turnkey's indorsements on the backs of the warrants, which warrants were afterwards regularly filed. Upon this, it was objected that the entries in the books were mere copies, and that the original minutes, from which the entry of the prisoner's discharge had been made, ought to be produced as the best evidence. But the court over-ruled the objection, and admitted the contents of the book, as it appeared to have been the constant and established practice of the keepers of public prisons to register the discharge of prisoners in such books as the one produced, and in the manner there described.

In another case, a parish register of christenings was received in evidence as an original authentic book, although the constant practice in the parish was to make a memorandum of the christenings in a day-book, from which entries were some time afterwards made into the register. (1) The question in that case was on the plaintiff's legitimacy, and on the part of the plaintiff a general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared, that the practice was to make the entries in this register once in three weeks out of a day-book, in which entries were made immediately after the christening or the same morning; and in the case of illegitimate children, to insert in the entry the letters B. B., which were intended to signify "base born." The counsel for the defendant then offered in evidence the day-book, from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry. But a majority of the judges present on a trial at bar were of opinion, that such evidence ought

(1) May v. May, 2 Str. 1072. Lee v. Meecock, 5 Esp. N. P. C. 177. See Hughes v. Wilson, 1 Starkie, 179.

not to be received, on the ground, that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register.—If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father or the mother, or made under their direction, such evidence would have been admissible as the declaration of a deceased parent on a question of legitimacy: but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum kept for the purpose of assisting the clerk to make up the register, (and of that nature it seems here to have been considered,) in that case it could not be received as the original authenticated entry.

Rolls of manor courts.

The rolls of a court baron (which is the court of the freeholders,) or of the customary court (which is the copyholders' court,) are evidence between the lord of the manor and his copyholders or tenants. They are the public documents, by which the inheritance of every tenant is preserved, and the records of the manor court, which was anciently a court of justice relating to all property within the manor. (1) So ancient writings, not properly court rolls, but found among the court rolls, and delivered down from steward to steward, purporting to be made "assensu omnium tenentium," have been admitted as evidence to prove the course of descent within a manor: and this, although they were not signed by any of the tenants. (2) And an entry in the court rolls, stating the several customs within the manor as found by the homage, and regulating the descent of the several species of tenure, was in another case admitted to be good evidence of the mode of descent, although no instances were shewn of any tenant having in fact so taken under the custom. (3) "It cannot be doubted," said Lord Kenyon, "that this evidence was admissible, for tradition and the received opinion are the lex loci. Here was full proof of a tradition respecting the

(1) Gilb. Ev. 67. 4 T. R. 670.

(2) Denn dem. Goodwin v. Spray, 1 T. R. 466. 473.

(3) Roe dem. Beebee v. Parker, 5 T. R. 26. Roe dem. Bennett v. Jeffery, 2 Maul. & Sel. 92.

custom of descent in this manor; it was the solemn opinion of twenty-four homagers, who are the constitutional judges of the court, delivered on an occasion when they were discussing the interests of all the tenants of the manor."

Upon the same principle, in an action by a copyholder against a freeholder of a manor for surcharging the common an old writing, found among the muniments of the manor, and purporting to be signed by many of the copyholders, stating that the commoners of the manor had an ancient unlimited right of common, but that they had agreed to a certain stint, was held admissible evidence of the reputation of the manor at that time, as to the general prescriptive right of common, against the limited right insisted on by the plaintiff; and although it was not proved that the instrument had been signed by a majority of the copyholders, or that the plaintiff held the copyhold tenements under any one of those who had signed, yet that circumstance could not affect the admissibility of the instrument, which was offered in evidence, not on the footing of an agreement, but as evidence of tradition and the received opinion within the manor. (1)

Terriers.

Terriers are of two kinds, temporal and ecclesiastical. It has been established by a variety of cases, that old terriers, or surveys of a manor, are evidence of manorial tenures or boundaries. (2) And an ecclesiastical terrier is evidence of the possessions of a church, if it has been regularly made and preserved in the proper repository. Ecclesiastical terriers are constantly received in questions of tithes: they are ecclesiastical records, made in perpetuam rei memoriam, and are as solemn instruments as any that can be produced on such subjects. (3)

By the ecclesiastical canons, an enquiry is directed to be made, from time to time, of the temporal rights of the clergyman in every parish, and to be returned into the

(1) Chapman v. Cowlan, 13 East, 10.

(2) Gilb. Ev. 69.

(3) 5 Price, 380. 386.

registry of the bishop. This return, which is generally signed by the minister, is denominated a terrier, and derives its authority from being found either in the bishop's register office (1), or the registry of the archdeacon of the diocese. (2) Unless it comes from one of these repositories, it cannot, in general, be admitted in evidence. A paper therefore, purporting to be a terrier, found in the charter-chest of a college, which had property in the parish, was thought to be inadmissible to disprove a modus. (3)

Custody of terrier.

However, under particular circumstances, this rule respecting the custody of the terriers has been relaxed, and a terrier has been admitted, though not brought from one of the regular repositories, when the custody in another place has been satisfactorily explained. One that was found in the registry of the dean and chapter of Lichfield, has been admitted in evidence against a prebendary. (4) This evidence was rejected at the trial; but a new trial was afterwards granted by the Court of King's Bench, on the ground, that the evidence ought to have been received, as there appeared to be a proper connection between the terriers and the place where it was found; and a strong corroborating circumstance was, that the terrier was found annexed to an old lease of the prebend, of nearly the same date. (5) But when the custody is merely private, and unconnected with the subject-matter, the courts have never gone the length of admitting such papers in evidence. An instrument, therefore, purporting to be an endowment, without the seal of the bishop, and another purporting to be an Inspeximus of the former under his seal, were rejected, because they came out of the hands of a private person entirely unconnected with the matters contained in them. (6)

For the same reason, before ancient grants can be admitted as evidence of private rights, the custody, in which they

(1) Atkins v. Hatton, 4 Gwill. 1406. 2 Anstr. 386. S. C. 4 Gwill. 1593.

(2) Potts v. Durant, 4 Gwill. 1450. 1454. See Drake v. Smyth, supra, p. 406. note (5).

(3) 4 Gwill. 1406.

(4) Miller v. Foster, 4 Gwill. 1406. n. and see Bullen v. Michel, stated in ch. 8. s. 2. infra.

(5) 4 Gwill. 1455.

(6) Potts v. Durant, 4 Gwill. 1450.

have been kept, ought to be satisfactorily explained. In a late case, a grant to an abbey, contained in a manuscript entitled "Secretum Abbatis" in the Bodleian library at Oxford, was rejected, as not coming from the proper custody (1); and, on the authority of this case, Mr. Justice Lawrence held, that an old grant to a priory, brought from the Cottonian manuscripts in the British Museum, could not be received, as it was not shewn that the possession of the grant was connected with any person who had an interest in the estate. (2)

Terrier, for or against whom evidence.

A terrier is strong evidence against a parson; but it is never admitted for him, unless it be signed by a churchwarden, or, if the churchwardens are nominated by him, by some of the substantial inhabitants of the parish. (3) Old terriers signed by the rector, churchwardens, and other inhabitants of the parish, are evidence for a succeeding rector against the land-owners, on a question of farm-modus, although they are not proved to have been signed by occupiers of the farm, or by any persons from whom the land-owners derive title. (4)

Signing of terrier.

Terriers are generally signed by the minister of the parish; but this does not appear to be essentially necessary. In a late case (5), on a bill, filed by a vicar against the impropriatrix of a rectory, for agistment tithe, a terrier was given in evidence, on the part of the vicar, signed only by the churchwardens; it was objected, first, that it was not a terrier, because made by the churchwardens alone, and not signed by the vicar; secondly, even supposing it to be a proper terrier, yet that it could not be admitted in evidence in that cause against the rector, as it was not signed by any person claiming under, or on the part of, the rector. However, the court were of

(1) Michell v. Rabbets, cited 3 Taunt. 91. See Bullen v. Michel, stated infra; and see infra, ch. 8. s. 2. on the custody of documents.

Swinnerton v. Marquis of ...rd, 3 Taunt. 91. Earl v. Lewis, 4 Esp. N. P. C. 1.

(3) Bull. N. P. 248. Earl v. Lewis, 4 Esp. N. P. C. 3.

(4) Mytton v. Harris, 3 Price, 19. Wood B. contra.

(5) Illingworth v. Leigh, 4 Gwill. 1615.

opinion, that the terrier was admissible; that such imperfect terriers were now uniformly received; that the terrier in question was signed by persons who were in no respect interested, and whose duty it was, from their official situation, to sign it; and that the want of the vicar's signature made it stronger evidence in favour of his successor.

The ancient books of the heralds' office (1), and their visitation-books of counties (2), are evidence on a question of pedigree. The visitation-books contain the pedigrees and arms of the nobility of the kingdom from the twenty-first year of Henry VIII. to the latter end of the seventeenth century, during which period the two provincial kings of arms, soon after their investiture in office, usually received a commission under the great seal, authorizing them to visit the several counties within their respective provinces, "to take survey and view of all manner of arms, cognizances, crests, and other like devices, with the notes of the descents, pedigrees, and marriages of all the nobility and gentry therein contained; and also to reprove, control, and make infamous by proclamation, all such as unlawfully and without just authority usurp or take any name or title of honour or dignity." The first of these commissions was issued in the twenty-first year of Henry VIII., and the last in the second of James II. (3) From these visitation-books, entries were afterwards made into the books kept at the College of Heralds.

Herald books.

A licence from the Pope, granted in the reign of Edward II., has been adjudged, in an old case, to be evidence of an impropriation, the Pope being formerly the supreme head of the church, and having the disposition of all spiritual benefices. (4) For the same reason, a Pope's bull was for-

Pope's bull.

(1) King dem. Lord Thanet v. Foster, 2 Jon. 224.
(2) Pitton v. Walter, 1 Str. 161. Matthews v. Port, Comb. 63.
(3) See First Report of the House of Commons on the Public Records, p. 82. Appendix, (o. 8.)
(4) Cope v. Bedford, Palm. 427.

merly admitted in evidence, to shew that monastery lands had a special exemption from the payment of tithes. (1)

Corporation books.

Corporation-books, containing an account of the privileges or public transactions of the body, are evidence in a suit between the several members, on the same footing as manor-books between the tenants of a manor. But they are not evidence in favour of a corporation to support a claim of right against a stranger (2); and before they can be admitted in any case, it ought to be shewn that they have been regularly kept by the proper officer of the corporation. On an information in the nature of a quo warranto, the prosecutor produced in evidence a book written by the prosecutor's clerk, not an officer of the corporation, which appeared to be only minutes of corporate acts done some years before, and was not kept as a public book of the corporation; this evidence was rejected at the trial, and, on a motion afterwards for a new trial, the Court held that it had been properly rejected. "Corporation-books," the Court said, "are generally allowed to be given in evidence, when they have been publicly kept as such, and when the entries have been made by the proper officer; not but that entries made by other persons may be good, if it be shewn that the town-clerk is sick, or refuses to attend." (3)

Histories.

A general history may be admitted, says Mr. Justice Buller, to prove a matter relating to the kingdom at large. (4) Thus, in the case of St. Katharine's Hospital, Lord Hale allowed Speed's Chronicles to be evidence of a particular point of history in the time of Edward III. (5) And the same book was admitted as evidence of the death of Edward the Second's queen, in the case of Lord Brounker v. Sir R. Atkins (6),

(1) Lord Clanricard's case, Palm. 37.

(2) 1 H. Black. 214. n. (c), Mayor of London v. Mayor of Lynn. In the case of the Mayor of Kingston-on-Hull v. Horner, Cowp. 102., such evidence was received, but by consent; see 1 H. Bl. 214.

(3) R. v. Mothersell, 1 Str. 93. 12 Vin. Abr. Evidence, (A. b. 15.) pl. 16.

(4) Bull. N. P. 248.

(5) 1 Vent. 151. Stainer v. Burgesses of Droitwich, 1 Salk. 282. Skin. 623. S. C.

(6) Skin. 14.

where Ch. J. Pemberton said, he knew not what better proof they could have. Histories, however, it is admitted, cannot be received as proof of a private right or particular custom. (1) Camden's Britannia was therefore rejected on an issue, whether by the custom of Droitwich salt-pits could be sunk in any part of the town, or only in a certain place. (2) And in another case, where the question was, whether a particular abbey was of the inferior order, Dugdale's Monasticon was refused, because the original records might be had in the augmentation-office. (2) So, it has been determined, that Dugdale's Baronage is not evidence to prove a descent. (3)

Proof of entry in public books.

With regard to the proof of entries in public books, it is now clearly settled, that wherever an original is of a public nature and admissible in evidence, an examined copy will equally be admitted. (4) This rule is necessary, as well for the security of the document, as for the convenience of the public. Examined copies, therefore, of entries in the Journals of the Lords or Commons (5), or of entries in the Council-book in the Secretary of State's office (6), or of entries in the Bank books (7), or in the books of the East-India Company (8), and examined copies of entries in parish registers, or in the books of assessments made by the commissioners of land-tax (9), or in the books of the commissioners of excise (10), or in the court-rolls of a manor (11), or in poll-books of an election of mayor or member of parliament (12), and examined copies in other cases of the same kind, have been admitted in

(1) Bull. N. P. 248. Cockman v. Mather, 1 Barnardist. 14.
(2) 1 Salk. 282. Skin. 623.
(3) Piercey's case, 2 Jon. 164.
(4) Holt C. J. in Lynch v. Clerke, 3 Salk. 153. R. v. Haines, Comberb. 337. Skin. 583. S. C.
(5) Jones v. Randal, Cowp. 17. R. v. Ld. G. Gordon, 2 Doug. 593.
(6) Eyre v. Palsgrave, 2 Campb. 606.
(7) Marsh v. Colnet, 2 Esp. N. P. C. 665. Breton v. Coape, Peake, N. P. C. 30.
(8) 2 Doug. 593. n. (3).
(9) R. v. King and others, 2 T. R. 234.
(10) Carth. 346. R. v. Commissioners of Land-tax, 2 T. R. 234.
(11) Tucky v. Flower, Comberb. 137. R. v. Haines, ib. 337., by Holt C. J. Doe dem. Churchwardens of Croydon v. Cook, 5 Esp. N. P. C. 221. Doe dem. Bennington v. Hall, 16 East, 208.
(12) Mead v. Robinson, Willes, 424.

evidence, when the original books themselves would have been admissible. But where an original is of a private nature, a copy will not be evidence, unless the original is lost, or destroyed, or in the possession of the opposite party. Thus, the copy of an old letter, brought from the chest of a corporation, has been refused. (1) In one case, indeed, where the original was kept in the Bodleian library at Oxford, and by the statutes of the university not removable, an examined copy was allowed to be given in evidence (2); the Court admitted the case not to be within the general rules of evidence, but, under the particular circumstances, permitted the copy to be read.

(1) R. v. Gwyn, 1 Str. 401.

(2) Downes v. Moreman, 2 Gwill. 659. Bunb. 189. S. C.

CHAP. VII.

Of the Inspection of Public Writings.

Records.

THE judicial records of the king's courts are safely kept for the public convenience, that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an act of parliament in the forty-sixth year of Edward III. (3)

Copy of indictments.

Some restriction, however, of the general right of inspecting records has been thought necessary in the case of an acquittal on a prosecution for felony; in which case, if the trial is at the Old Bailey, a copy of the indictment cannot regularly be obtained without an order from the court; and it is a common practice, on the circuits, to apply to the court for a copy at the time of the trial. This practice appears to have been first adopted at the Old Bailey, in pursuance of an order made by some of the Judges, for the regulation of those sessions in

(3) 3 Inst. 71. Pref. to 3d. Rep. p. 3, 4.

the twenty-sixth year of Charles II.(1) It was then ordered, "that no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery; for the late frequency of actions against prosecutors, which cannot be without copies of the indictment, deterreth people from prosecuting for the king upon just occasions." And Lord Holt has laid it down as a general rule of law, that if a person be indicted for felony and acquitted, and means to bring an action (without sufficient cause), the Judge will not permit him to have a copy of the record, and he cannot have a copy without leave.(2) In the case of Vandercomb and Abbott (3), the prisoners after their acquittal applied for copies of the several indictments, for the purpose of assisting them in their plea of autrefois acquit: the court, however, refused to grant them copies, but ordered the officer to read over the indictments slowly and distinctly, which was accordingly done.

The rule of the Judges states, that an action against a prosecutor cannot be maintained without a copy of the indictment, and that a copy is not to be given without an order from the court; but it is not to be inferred from this, that an order is essentially necessary for the introduction of a copy in evidence, or, if a copy were offered to be produced without an order, that it could on that account be properly rejected. The admissibility of such evidence has been determined in the case of Legatt v. Tollervey.(4) On the part of the plaintiff, in that case, the clerk of the court of quarter sessions, before which the indictment had been tried, produced a copy, which for want of an order was not allowed to be read; and the plaintiff was in consequence nonsuited. But the Court of King's

(1) Directions for Justices at the Old Bailey, prefixed to Kelyng's Rep. p. 3, order 7. See Brangam's case, 1 Leach, Cr. C. 32. In this case, Willes C. J. is reported to have said, that, by the laws of the realm, every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record, for any use which he may think fit to make of it; and that, after a demand, the proper officer might be punished for refusing to make out a copy.

(2) In the case of Dr. Groenvelt v. Dr. Burwell and others, 1 Ld. Raym. 253.

(3) 2 Leach, Cr. C. 821.

(4) 14 East, 302.

Bench were of opinion, that the evidence ought to have been received, and set aside the nonsuit. "It is very clear," said Lord Ellenborough C. J., "that it is the duty of the officer, charged with the custody of the records of the court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the court, pursuant to the order that has long prevailed there; and with respect to the general records of the realm, upon application to the Attorney-General. But if the officer, even without authority, shall have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the court, and may be warned, at the time, of his peril in so doing, and a discreet officer placed in such a situation would, before he produced the record, or gave a copy of it, apply to the court, and state the circumstances; and it cannot be doubted, that he would be saved harmless in doing what, after such disclosure, the court should order him to do. But still I cannot help thinking, that the rule laid down by Lord Ch. J. Lee, in the case of Jordan v. Lewis (1), is the correct rule. The order made at the Old Bailey was there read by way of objection to the evidence offered, but the Chief Justice in that case said, that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without any order of the court for that purpose."

The rule, which has been before mentioned, is confined to cases of felony. In prosecutions for misdemeanors, the defendant is still entitled to a copy of the record, as a matter of right, without a previous application to the court. (2) So, in the case of a conviction by a magistrate, the defendant is entitled to a copy of the conviction, in order to defend himself against an action for the same offence; and if it

(1) 2 Stra. 1122. 14 East, 305. n. (a), S. C. reported from Mr. Ford's MS.

(2) Morrison v. Kelly, 1 Black. Rep. 385. Evans v. Phillips, reported from MS. in Selw. Ni. Pri. 952.

should be refused, and the defendant in consequence sue out a writ of certiorari, merely for the purpose of procuring a copy and making his defence, the magistrate will be compelled to pay his own costs of returning the conviction. (1) The conviction may be drawn up at any time, before the return to the certiorari or the sessions, though after a commitment (2), or after the levying of the penalty. (3) And the conviction returned to the sessions, or to the Court of King's Bench, is the only one, of which those courts will take judicial notice. (4)

Inspection of depositions.

A defendant on a criminal charge, is not entitled to an inspection of the grounds, upon which the prosecution has been instituted. In some species of treason, indeed, the prisoner is entitled to a copy of the indictment, a privilege not allowed by the common law, but conferred by act of parliament; but neither in cases of treason nor of felony, has he any right to a copy of the depositions of witnesses, who are to appear against him. So, when informations are filed by the Attorney-General, on depositions taken under the excise laws, the defendant is not allowed to inspect those depositions. And in a case where an information was filed against an officer of the East India Company, on charges of delinquency founded upon the report of a board of inquiry in India, the court of King's Bench were of opinion, that the defendant had no right to have an inspection of that report, and that the court had no discretionary power to grant it. (5) "The practice on indictments at common law, and on informations upon particular statutes," said Mr. Justice Buller on that occasion, "shews it to be clear, that the defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial."

Proceedings of inferior jurisdictions.

The right of inspecting the proceedings of inferior jurisdictions is more limited. It cannot be necessary for the in-

(1) R. v. Midlam, 3 Burr. 1721.
(2) Massey v. Johnson, 12 East, 67. 82. 16 East, 20.
(3) R. v. Barker, 1 East, 186.
(4) Ibid. 188.
(5) R. v. Holland, 4 T. R. 691.

terests of the public, that they should be open for inspection to all persons without distinction; but, on the other hand, it seems reasonable, that, in any suit, where the regularity of those proceedings may come into question, a party should have the power of taking a copy of such, as have been instituted against himself. In an action of trespass and false imprisonment, brought by the plaintiff, who had been sued in the court of conscience in London, the Court of King's Bench allowed the plaintiff to inspect the proceedings, so far as they related to the suit against himself, on the ground that every one has a right to look into the proceedings to which he is a party. (1) In another case, where the plaintiff, having been fined for neglect of duty, as an under-officer to the commissioners of lieutenancy for the city of London, brought an action of trespass against the defendant for distraining upon him, the court granted the plaintiff a rule for inspecting and taking copies of the rates and assessments made by the commissioners. (2) On the same principle, in an action for a malicious prosecution and false imprisonment, the plaintiff may obtain a rule for a copy of the information, upon which he was committed; and, as the original itself ought to be produced at the time of the trial, the court will also grant a rule, calling upon the committing magistrate to cause it to be produced. (3)

A different rule, however, was adopted by the court in the case of Dr. Groenvelt v. Dr. Burwell (4), and in Abery v. Dickenson. (5)

1. The first of these cases was an action for false imprisonment against the defendants, who justified as censors of the college of physicians by virtue of their charter, by which charter they have power to fine and imprison *pro non bene*

(1) Wilson v. Rogers, 2 Str. 1242.

(2) Edwards v. Vesey, Rep. temp. Hard. 128.

(3) R. v. Smith, 1 Stra. 126. Welch v. Richards, Barnes, 468. S. P. See also Herbert v. Ashburner, 1 Wils. 297. Moody v. Thurston, 1 Stra. 304.; and R. v. Commissioners of Land-tax, 2 T. R. 234.

(4) 1 Ld. Raym. 253. 454. Carth. 421. 491. S. C.

(5) Say. 250.

utendo facultate medicinæ; they then set forth, that the plaintiff at such a time, and place had administered unwholesome medicines to A. B., and so justified the taking and imprisoning. The counsel for the plaintiff moved, that the registrar of the college should permit the plaintiff to have copies of the proceedings and judgment, to enable him to reply to the defendant's plea in justification; and, in support of the application, it was said, that the plaintiff was a party to the judgment, and therefore had a right to a copy, and that it is the usual practice, if an action is brought for a false return to a mandamus, upon which the party is returned to be disfranchised, that the King's Bench will make an order for the plaintiff to have recourse to the public books. But the court refused a rule, saying, (as Lord Raymond reports the case,) "that they could not oblige the college of physicians to permit the plaintiff to have a copy of their proceedings; for they act in a judicial manner, by authority of an act of parliament; and therefore it shall be presumed that they have done right." The report of this case by Carthew differs materially from that by Lord Raymond. Carthew reports, that the court admitted the rule, for inspecting the proceedings, to be usual for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead. The reason given in Lord Raymond's report, (namely, " that the proceedings must be presumed to be regular, since the college acted in a judicial manner, by authority of an act of parliament,") seems to proceed upon the supposition that the proceedings were truly and correctly set out in the defendant's plea; and on a demurrer, (which admits all the facts in justification,) that reason would have been conclusive; it might then have been justly said against the demurrer, that, the defendants having shown their authority over the plaintiff, and the fact, for which he had been punished, being within their jurisdiction as censors, and not traversable in this collateral suit, they could not be liable to an action for what they had done within the limits of their jurisdiction, and in the discharge of their judicial powers. But if, instead of demurring, the plaintiff, in such a case, had admitted the warrant under which the defendants

arrested him, and replied that "they had committed the trespass of their own wrong and without the residue of the cause alleged in their plea," it would then have been competent for him to show, that the defendants had exceeded their jurisdiction: and, for the purpose of enabling him to be prepared with this defence, the plaintiff seems to have been entitled, at least after issue joined, to an inspection of such proceedings as had been instituted against himself.

2. In the other case, of Abery v. Dickenson(1), which was an action of trespass against the defendant for taking a distress for a penalty, under an order of certain commissioners, the Court of King's Bench is reported to have refused the rule, on the ground that the commissioners were not parties to the suit. The same objection might have been made in the other cases, which have been before cited (2); but the court there allowed an inspection, (although the persons, who had the custody of the goods, were not parties to the suit,) because the plaintiff, who applied for the rule, was the object of the proceedings, under which the defendants had acted.

Parish registers, and other public books.

Parish registers, books of the India Company relating to the transfer of stock, books of the Bank, &c. are for some purposes considered as public books; and persons, interested in them, have a right to inspect and take copies of such parts as relate to their interest. (3) So the books of the commissioners of the lottery, and their numerical lists, are of a public nature; and kept by the commissioners in trust for the ticket-holders, who are entitled to an inspection, by rule of court. (4)

Access is not allowed to such parish-books, as are kept only for the private use of the parish, and relate to their private interests. An inspection was for that reason refused, in

(1) Say. 250.
(2) See cases cited in p. 426.
(3) Geery v. Hopkins, 2 Lord Raym. 851. Warriner v. Giles, 2 Stra. 954. Mayor of London v. Swinland, 1 Barnardist. 454.
(4) Schinotti v. Bumstead and others. 36 G. 3. cited from a MS. case in 2 Tidd Prac. 596.

an action of ejectment by an impropriator against the church-wardens of a parish, where a rule was applied for, on the part of the plaintiff, suggesting, that the parish-books would make the titles appear, and that they were the common books belonging to the parish at large; but the court were of opinion, that, when the person claims a distinct interest from that of the parish, it is not reasonable to compel the parish to discover their title by showing their books, which are kept only for their own use. (1) For the same reason, a public company will not be compelled to produce any books relating to their private transactions. (2)

Nor will access be granted to the books of public offices, in collateral actions brought by persons who have no interest in the books; therefore, in a qui tam action for penalties against a clerk in the post-office, for interfering in the election of a member of parliament, the prosecutor was not allowed to have a rule for inspecting the books of the post-office, as the cause did not relate to any transaction in the post-office, for which transactions alone those books are kept. (3) Nor will the court grant a rule for inspecting the custom-house books, for the purpose of furnishing evidence in an action between two persons, who have no interest in the subject-matter, concerning the amount of a particular branch of the public revenue. (4)

Rolls of manor-courts.

The court-rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights, to which evidence all the tenants of the manor, whether copyhold or freehold, have an undoubted right of access, as well in actions between the tenants and the lord, as between the tenants them-

(1) Cox v. Copping, 5 Mod. 395. 1 Ld. Raym. 337. Lewis v. Baker, 1 Barnardist. 100. Turner v. Gethin, Vin. Ab. tit. Evidence, (F. b.) pl. 11. As to the inspection of the proceedings before commissioners of bankrupt; see ante, p. 369.

(2) Shelling v. Farmer, 1 Stra. 646. Murray v. Thornhill, 2 Stra. 717.

(3) Crew q. t. v. Blackburn, cited 1 Wils. 240. 2 Stra. 1005. S. P.

(4) Atherfold v. Beard, 2 T. R. 614. 616.

selves (1); and it is now a matter of course to grant a rule for the inspection of the court-rolls and ancient writings of a manor, on the application of a tenant, who has been refused by the lord.

This privilege of inspection is confined to the tenants of the manor, and cannot extend to third persons, who have no concern or connection with the manor court or the court-rolls. Thus in an action of trespass, where the question was, whether the place, in which the trespass was alleged to have been committed, was within the manor of the plaintiff, or part of a manor claimed by the defendant, the court held, that the defendant, who, as it appeared from his affidavit, was not a tenant of the plaintiff's manor, nor claimed any interest under him, could not be entitled to an inspection. (2) And it may be laid down as a general rule, that where the question is on the custom of a manor between the lord and a stranger, the lord shall not be obliged to let him have an inspection of the rolls, because, in any dispute with a stranger, they may be considered as his private evidence; but if the dispute is between tenants of the manor, or between the lord and a tenant, the lord shall produce the roll, and permit copies to be taken.

Corporation-books.

Corporation-books are open to the members of the corporation, as court-rolls are to the tenants of a manor.* Thus,

(1) Roe v. Aylmer, Barnes, 236. Hobson v. Parker, ib. 237. Addington v. Clode, 2 Black. Rep. 1030. Folkard v. Hemet, ib. 1061. R. v. Shelley. 3 T. R. 141. R. v. Lucas, 10 East, 235. Bateman v. Phillips, 4 Taunt. 162.

(2) Talbot v. Villeboys, cited from MS. by Buller J. 3 T. R. 142. Smith v. Davies, 1 Wils. 104. Bp. of Hereford v. Duke of Bridgwater, Bunb. 269. Attorney-General v. City of Coventry, Bunb. 290.

* By stat. 32 G. 3. c. 58. s. 4. a penalty of a hundred pounds is incurred by any officer of the corporation, having the custody of the corporation records, who shall refuse to allow any other officer or member to inspect books and papers, wherein are entered the admission or swearing in of the freemen, burgesses, or members of the corporation, and to take copies or

where a mandamus had been granted to admit a person into a corporation, and by the return it appeared to be a question, whether the master, under whom he had served, had been admitted to his freedom in the corporation, a rule was moved for, on the part of the person claiming admission, to inspect the books of the corporation; and the court held that every member has a right to inspect and take copies of corporation-books for any matter that concerns himself, even in a dispute with strangers; but, as the return had pointed out the necessity of inspecting them for a particular purpose, the rule should be confined to such books as contained the admissions of freemen. (1) So, where an information in the nature of a quo warranto had been obtained, at the relation of corporators, against a person charged with unlawfully holding a corporation-office, the court held, that these relators were entitled to inspect the books, and that the rule should be limited to the inspection of such papers as related to the subject-matter in discussion. (2)

This right of inspecting the muniments of a corporation is confined to the members of the corporate body. A stranger has no better right to inspect corporation-books, than to inspect the books of any private person. On a prosecution against a person for practising physic, (not being a member of the college of physicians, nor having a licence, nor being a graduate of either university,) the defendant moved for leave to inspect the book of the college of physicians, but the court refused to grant the rule, as the defendant, who was not a member, had no right to see the books. (3) And in an action of trespass, where the defendant justified under a corporation

(1) R. v. Fraternity of Hostmen in Newcastle, 2 Str. 1222.

(2) R. v. Babb, 3 T. R. 579. Crew q. t. v. Saunders, 2 Str. 1005. Corporation of Barnstaple v. Lathey, 3 T. R. 303. Young v. Lynch, 1 Black. Rep. 27.

(3) Dr. West's case, cited 1 Wils. 240. Allan v. Tapp, 2 Black. Rep. 850.

minutes of such admission, &c. Books, containing orders for the admission and swearing in of the burgesses, are not within the provisions of the statute. Davies v. Humphreys, 3 Maul. & Selw. 223.

for distraining for a toll, the court refused a similar rule to the plaintiff, who was a stranger to the corporation. (1) A different practice was at one time introduced in courts of law (2), upon the ground, that, on filing a bill for disclosure in a court of equity, an inspection would be granted as a matter of course, and that it would only cause unnecessary expense to send the parties into that court. But this practice, which was not warranted by earlier authorities (3), nor conformable to the practice of courts of equity, has been long discontinued; and the rule of law, now established, is, that in disputes between several members of a corporation an inspection of the corporation-books will be granted, because each has a right to see them; but an inspection will not be granted in the case of a corporation, when a similar inspection would be refused, if the suit were between private persons. No distinction is to be made, in this respect, between a corporation aggregate and a corporation sole, nor between a corporation sole and a private person suing in his individual capacity. (4)

Inspection when not compelled.

The rule for inspecting court-rolls, corporation-books, and other public writings will not be allowed, where the party who has them in his custody, would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a prosecution. On an information, therefore, against several persons, for executing an office of trust without taking the oaths, the court refused a motion for leave to inspect some books kept by the defendants, in which they had entered their elections, receipts, and disbursements, as it would have compelled them to give evidence against themselves in a criminal prosecution (5): and a similar motion was refused, on an information against two overseers for making a rate without the

(1) Cited by De Grey C. J. in Hodges v. Atkis, 3 Wils. 398. and by Lawrence J. in 8 T. R. 594. Mayor of Southampton v. Graves, 8 T. R. 590.

(2) Mayor of Lynn v. Denton, 1 T. R. 689. Corporation of Barnstaple v. Lathey, 3 T. R. 303.

(3) Dr. West's case cited, 1 Wils. 240. R. v. Dr. Bridgeman, 2 Str. 1203. Mayor of Exeter v. Coleman, Barnes, 238. Hodges v. Atkis, 3 Wils. 398.

(4) 8 T. R. 593.

(5) R. v. Mead, 2 Ld. Raym. 927. R. v. Worsenham, 1 Ld. Raym. 705. R. v. Cornelius, 2 Str. 1210.

concurrence of the churchwardens. (1) Another case to the same effect is the case of the King v. Dr. Purnel (2), where, on an information against the defendant for a misdemeanour in his office of vice-chancellor of the university of Oxford, a rule for taking a copy of the university-statutes, in the care of the keeper of the archives, was refused by the Court of King's Bench, after great consideration; and the principle, that no man shall be bound to accuse himself, was fully recognized. This principle will not apply to the case of informations in the nature of a quo warranto, for usurping a franchise or intruding into a corporation-office; for such informations, although originally and strictly criminal methods of prosecution, are applied to the purpose of trying civil rights, and are considered at present as merely civil proceedings. On an information, therefore, exhibited at the relation of a member of a corporation, against a person for unlawfully executing an office, the relator, who as member has a right and interest in the books of the corporation, may obtain an inspection and copy of such, and of such only, as relate to the subject-matter in discussion. (3)

How to obtain inspection.

The motion for a rule to inspect and take a copy, where an action is depending, is founded on an affidavit stating the circumstances, under which the inspection is claimed, and stating further, that an application has been made in the proper quarter, for permission to make the required inspection, which has been refused. (4) Where a motion for a mandamus, or for an information in nature of a quo warranto in a corporation, is depending, the court will grant a rule absolute in the first instance. (5) But when the motion is for a writ of mandamus to inspect, grounded upon affidavits, the rule, then to be granted, is only a rule to shew cause.

With regard to the proper stage of the proceedings for making the application, it may be observed, that the court has

(1) R. v. Lee, cited 1 Wils. 240.
(2) 1 Wils. 239. 1 Black. Rep. 37. R. v. Heydon, 1 Black. 351.
(3) R. v. Babb, 3 T. R. 579.
(4) Roe v. Aylmar, Barnes, 236
(5) R. v. Shelley, 3 T. R. 141.

refused the motion in an action against a corporation upon a right of toll, *because issue was not joined*, so that it could not appear, whether an inspection would be necessary. (1) And in the case of Dr. Groenvelt v. Burwell, before-mentioned, where the plaintiff applied for a copy of the proceedings instituted against him by the college of physicians, the court admitted the rule for inspecting the proceedings to be usual, for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead. (2) If a rule has been granted to shew cause, why a mandamus should not be awarded, the court will not make a rule for inspecting and taking copies, until the first rule is made absolute, and a return is made to the mandamus (3); and it has been thought the most convenient practice, where a rule nisi for a quo warranto information has been obtained, not to grant an inspection until the information is granted. (4)

If no action is depending, the proper motion is for a rule to shew cause, why a writ of mandamus should not issue, commanding the officer, who has the custody of the books to permit the party to inspect and take a copy. The affidavit, upon which this motion is founded, ought to state clearly the right, under which the inspection is claimed, and that the inspection has been refused. In a case of this kind, where an inspection of the court-rolls of a manor was applied for, the party stated in his affidavit a primâ facie title to a copyhold of the manor; and the Court of King's Bench held, that as he was clearly entitled to the copyhold, unless it had been conveyed away by those under whom he claimed, he had a right to see whether any such conveyance appeared on the rolls, and the court therefore made the rule absolute, so far as related to the copyhold lands, the subject of the party's claim. (5)

(1) Hodges v. Atkis, 3 Wils. 398. 2 Black. Rep. 877. S. C.
(2) Carthew. 421.
(3) Per. Cur. in R. v. Justices of Surrey, Say. 144.
(4) By Ashurst J. in R. v. Babb, 3 T. R. 581. R. v. Hollister, Rep. temp. Hard. 245.
(5) R. v. Lucas, 10 East, 235.; and see 3 T. R. 142. R. v. Tower, 4 Maule & Selw. 162.

CHAP. VIII.

Of Private Writings.

THE nature and proof of public writings having been considered, the next branch of our subject relates to private writings.

It is a general rule of evidence, that, where a fact can be established by written proof, which is in its nature superior to parol proof, the writing ought to be produced, and parol evidence of the fact is inadmissible; for the best evidence is to be produced, of which the nature of the case is capable; as, where an agreement has been reduced into writing and signed by the parties, the primary evidence of the contract is the original agreement itself, which will exhibit the precise language and terms adopted by the contracting parties.

The statute of frauds (1) requires a written instrument or memorandum, in a great variety of cases, where writing would not have been necessary by the rules of the common law. And as cases of this kind are continually occurring in practice, it may be useful to consider them in this place, with as much conciseness as the subject will allow.

An inquiry, therefore, into those cases, in which a written instrument or memorandum is required by the statute of frauds, is the subject of the first section of the present chapter. The second section will treat of the proof of deeds and agreements; and the third, of the proof of wills. The two following chapters treat of the requisite of stamping, and of the admissibility of parol evidence to explain written instruments.

(1) St. 29 C. 2. c. 3.

Sect. I.

Of Written Agreements, &c. required by the Statute of Frauds.

The three first sections of this statute relate to interests created in real property; the fourth section relates to several kinds of agreements; the fifth section, to wills and devises of real property; the seventeenth, to contracts for the sale of goods.

Sect. 1. The first section declares the legal effect of leases, which are not in writing. It enacts, "that all leases, estates, interests of freehold or terms of years, or any uncertain interests, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only or by parol, and not put in writing and signed by the parties so making or creating the same, or [by] their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."

Sect. 2. Then the second section makes the following exception of certain leases: "Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent, reserved to the landlord during such term, shall amount unto two-thirds at least of the full improved value of the thing demised.

Sect. 3. The third section enacts, "that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same or [by] their agents

thereunto lawfully authorised by writing, or by act and operation of law."

Construction of sect. 1. & 2.

The meaning of the first and second sections appears to be, that such leases of messuages, manors, lands, &c., as do not exceed the term of three years from the making thereof, and upon which the rent reserved to the landlord during the term amounts to two-thirds at least of the full improved value of the thing demised, are valid without writing (1), provided that no writing were necessary before the statute of frauds; but that all leases of messuages, lands, &c., which exceed the term of three years from the making thereof, (whatever may be the amount of the rent reserved,) or upon which, if they do not exceed that term, less than the two-thirds of the full improved value is reserved, have the force and effect only of leases or estates at will, unless put in writing and signed, as the statute directs; and further, that all other interests, created without writing, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, whether they are interests of freehold or terms of years, or for an uncertain duration, can only have the same effect, namely, of leases or estates at will. (2) The first section, as it has been justly observed (3), seems to embrace interests of every description, while the exception in the second section relates only to leases of a particular description. A mere easement in lands or tenements, &c. is not an interest within the provision of the first section. Agreements, therefore, for the liberty of using a way over another person's field, or for stacking coals upon his close (4) *, or for nailing the

(1) Ryley v. Hicks, 2 Str. 651.
(2) By Lee C. J. and Denison J., in Wood v. Lake, Say. 4.
(3) See Sugden's Treatise on the Law of Vendors and Purchasers, 4th. edit. 56. 59.; and the observations there made on a part of the judgment in the case of Crosby v. Wadsworth, 6 East, 610.
(4) Wood v. Lake, Say. 5.

* In the case of Wood v. Lake, the licence was for seven years; and a material part of the agreement was, that the party, who had the liberty of stacking, had also the sole use of the close. The question was, in an action on the case for obstructing the plaintiff, whether the agreement was good for seven years: and the Court, after taking time to consider, held that it

frame-work of a skylight against the wall of his house (1), are valid without writing.

Leases by parol, not within the exception before mentioned, are not available as to the duration of the interest; for the statute enacts, that they shall have the force and effect of leases or estates at will only; but still they may in some cases be applied to regulate the terms, on which the tenancy subsists in other respects, as, for example, the amount of the rent, or the time of the year when the tenant is to quit. In the case therefore of Doe on the Demise of Rigge against

(1) Winter v. Brockwell, 8 East, 310. n (*a*)

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was good. On the argument, Lee C. J. and Denison J. were of opinion, that the agreement was only for an easement and not for an interest in the land, and that it did not amount to a lease, on the authority of the case of Webb v. Paternoster, (Palm. 71. S. C. 2 Roll. Rep. 143. Pop. 151.), where it was laid down, that the grant of a licence to stack hay upon land did not amount to a lease of the land. Wright J. was absent; and Foster J. at first doubted, whether the words in the statute, "*any uncertain interest in land,*" would not extend to this agreement; but the other Judges considered these words as relating only to interests uncertain as to the time of their duration. The case of Webb v. Paternoster, which was before the statute of frauds, will be found on examination not to support the case of Wood v. Lake to its whole extent. The simple question there was, whether a person, who had a licence to stack his hay on the close of A.B., until he could conveniently sell it, might maintain an action against the defendant, who subsequently to the licence had taken a lease of the close, and whose cattle had consumed the plaintiff's hay; the court gave judgment for the defendant, on the ground, that the plaintiff ought to have removed his hay within a reasonable time, which he had not done. With respect to the point, whether the licence had the effect of a lease, it does not appear from the report in Palmer to have been laid down either the one way or the other: but two of the Judges, are expressly said to have been of opinion, that it was an interest charging the land, and that the plaintiff had an authority coupled with an interest. However, there appears to be an obvious distinction between the two cases in this respect, that in the case of Wood v. Lake the party had not only the liberty of stacking upon the close, but had also the sole use of that part of the close; and this distinction seems not to have been noticed by the Court.

Bell (1), where a tenant, who entered upon the premises on Lady-day under a parol lease for seven years, and was to quit at Candlemas, held over, after receiving a notice to quit on Lady-day, the Court of King's Bench were of opinion, that the notice was irregular, and that the tenancy could only be determined at Candlemas, which was the time for quitting fixed by the agreement. And though the statute, after enacting "that such leases shall have the force and effect of leases or estates at will," further enacts, "that they shall not either in law or equity be deemed or taken to have any other or greater force or effect;" yet these words have been understood to mean, that a parol lease exceeding three years should not operate as a term, but that a holding under such a lease will now operate as a tenancy from year to year; because that is now construed to enure as a tenancy from year to year, which was then considered as a tenancy at will. (2)

Sect. 2.

Sect. 3.

Construction of sect. 3.; as to surrenders.

With respect to the third section, concerning assignments or surrenders, it is scarcely necessary to observe, that where a deed was requisite in order to perfect a surrender before this statute, a deed is still required; and in cases where a surrender might have been completed by mere parol, a note in writing, signed as the act directs, will now be sufficient. It has been determined, under this section, that a lease for years cannot be surrendered by a cancelling of the indenture; for the intent of the statute was to put an end to the practice, which then prevailed, of transferring interests in land by signs, symbols, and mere parol. (3)

In the case of a surrender "by act and operation of law," no deed or written memorandum will be necessary. An acceptance of a new lease by a lessee operates in law as a surrender of the former lease; the second lease being in writing, the transaction is of equal notoriety with a surrender in writing. (3) If B., tenant from year to year, underlet the premises to C., and the landlord afterwards accept C. as his

(1) 5 T. R. 471.

(2) Ld. Kenyon C. J. in Clayton v. Blakey, 8 T. R. 3.

(3) Magennis v. Macculloch, Gilb. Eq. C. 235. 6 East, 101.

Sect. 3. tenant with the assent of B., this also is a surrender of B.'s interest in the premises, by operation of law; so that the landlord has no longer any claim for subsequent rent against B. (1)

Although taking a new lease of premises, which have been already demised, will in many cases operate as a surrender in law of the first lease; yet a recital in the second lease, that it was granted partly in consideration of the surrender of a former lease, (the instrument not puporting to be of itself a surrender,) is not a surrender by deed or note in writing, within the meaning of the statute. (2)

The language of the third section corresponds as nearly as possible with that of the first, comprehending all leases and interests in the subject-matters specified, whether for a longer or shorter term than three years; and it is not followed, as that section is, by a clause excepting leases of a particular description. It must be obvious, therefore, upon the plain construction of the act, that although leases, reserving a rent not less than two-thirds of the improved value, may be created by parol for a term not exceeding three years, yet that such leases cannot be assigned (3), or surrendered by parol. (4)

Sect. 4. The fourth section of this statute enacts, that no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement

(1) Thomas v. Cook, 2 Barn. Ald. 119. Stone v. Whiting, 2 Starkie, 235.

(2) Roe dem. Berkeley v. Abp. of York, 6 East, 86.

(3) Botting v. Martin, 1 Campb. 317.

(4) Mollett v. Brayne, 2 Campb. 103. See Whitehead v. Clifford, 5 Taunt. 518. In this case the Court of Common Pleas held, that if a landlord accept from his tenant, in the middle of a quarter, the key of the demised house, under a parol agreement, that the tenant should no longer occupy, and that the rent should cease, he cannot recover rent for any subsequent time, in an action for use and occupation.

made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or [of] any interest in or concerning them; or upon any agreement, that is not to be performed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. Sect. 4.

Meaning and object of sect. 4.

It may be observed generally of this section, that the case, in which the legislature has required proof of the agreement in writing, is where the agreement is the subject of an action. The words are, "No action shall be brought, whereby to charge, &c., unless the agreement, upon which such action shall be brought, &c." Where an action therefore, is brought upon any agreement specified by the act, it will be necessary to prove a written agreement; otherwise, it cannot be enforced against the party charged. But the section does not extend so far as to make it necessary to prove the agreement in writing in those cases, where it is not the subject of the suit, but comes in only collaterally with the rest of the evidence in a proceeding between third persons, and where it is not material to consider, whether the agreement could be enforced in an action. Such cases are not within the express provision of the act; nor are they within the view of the legislature, which was to prevent fraudulent practices, and to secure persons against false charges in actions brought against them upon certain unwritten agreements. Thus, in a case where a landlord agreed with his tenant to accept an assignee in his place, for which he was to receive a certain proportion of the money paid for the good-will of the premises, and it had been previously agreed between the tenant and the assignee, that such part was to be paid for the landlord's consent, the Court of King's Bench held, that the landlord was entitled to recover that proportion as money received for his use, and that the circumstance of the agreement between the tenant and his successor not being in writing, could

Sect. 4. not properly come into question in an action between these parties. (1)

Nor is the section to be understood as giving validity to agreements, which would not be valid by the rules of common law; it leaves them to be judged of, with respect to all essential circumstances, (such as the consideration, the ability of the parties to contract, &c.) precisely according to the same rules as before the statute; it does not enact, that, when the agreement is in writing, the party must at all events be liable, but that the party shall not be liable to an action in certain cases, unless a written agreement be proved. (2) Nor, if the agreement is in writing, will it be necessary so to state it in the declaration; in which respect the statute has not made any alteration (3): but where the defendant, in bar of the plaintiff's right of action, pleads such an agreement as cannot be the subject of a suit unless in writing, (as, if he were to plead, in an action of assumpsit, an accord to accept payment by another in satisfaction,) there he ought to plead it to be in writing, that it may appear to the Court, that an action will lie upon it, for he ought not to be allowed to take away the plaintiff's action, without giving him a complete remedy upon the agreement pleaded. (4)

Although a defendant, in particular cases, is not to be charged in an action brought against him upon an agreement, unless the agreement is proved to be in writing, yet, if he has paid money into court on the plaintiff's declaration, it will not be necessary to prove the agreement, which is admitted on the record by such payment. For example, if an action is brought upon a promise to pay another person's debt in consideration of forbearance, and the defendant pays money into court on the count charging him with such promise, in this case he admits the agreement to be binding to a certain ex-

(1) Griffith v. Young, 12 East, 513.

(2) Rann v. Hughes, 7 T. R. 350. (a) Barrell v. Trussell, 4 Taunt. 121.

(3) Com. Dig. tit. Action on Assumpsit, (F 3.)

(4) Case v. Barber, Raym. 450. 2 Jon. 158. S. C. Com. Dig. ib

tent, disputing only the amount of the debt; and as this admission removes the danger of a false charge, it is reasonable, in such a case, that proof of the agreement should be dispensed with. (1) But an admission by one of the parties, not that the agreement as stated is binding, but merely that such an agreement was in fact made, would not be sufficient to preclude him from availing himself of the statute of frauds; as where the defendant has admitted the terms of the agreement in his answer to a bill filed against him in Chancery (2); or if a parol agreement were stated in a court of law, to which the other party demurs, that would admit the agreement, yet still advantage might be taken of the statute. (3) It may be observed further, that where there is one entire agreement for the performance of several things, if the plaintiff in an action upon this agreement cannot recover upon part of the agreement for the want of a memorandum in writing, he cannot recover at all, although there are some particulars, which would have been valid without writing, if they had formed a separate independent contract. (4) Sect. 4.

First, "*No action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person,* unless the agreement upon which, &c." Where the question is respecting the debt of another person, the true consideration is, whether the credit was originally given to the defendant alone, or whether the third person was liable as the debtor, and the defendant only guaranteed the payment. The latter case is within the statute; the established rule being, that, if the person, for whose use the goods are furnished, is liable at all, any other promise by a third person to pay that debt must be in writing (5); but in the former case, namely, where the debt is

Promise to answer for another person's debt, &c.

(1) Ramsbottom v. Brewer, Peake, N. P. C. 15.

(2) Rondeau v. Wyatt, 2 H. Bl. 63.

(3) 2 H. Black. 78.

(4) Lexington v. Clarke, 2 Ventr. 223. Chater v. Beckett, 7 T. R. 201. Cooke v. Tombs, 2 Anstr. 420. Lea v. Barber, ib. 425.

(5) Matson v. Wharam, 2 T. R. 80. Anderson v. Hayman, 1 H. Black. 120. Colman v. Eyles, 2 Starkie, 62.

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exclusively the debt of the defendant, a written memorandum will not be necessary. As, for example, suppose a man comes with another into a shop to buy, and the shopkeeper should say, "I will not sell him the goods, unless you will undertake that he shall pay me for them," and the other promises to that effect, such a promise is within the statute (1); but it would be otherwise, if the defendant had been the person originally liable to pay for the goods; as, if nothing more had appeared in the case, than that the defendant sent an order to the plaintiff requesting him to deliver goods to I. S., and that he (the defendant) would pay him the amount.

The question, in such cases, is a question of fact for the consideration of the jury, who are to determine, whether the credit was given to the defendant alone, or to the defendant jointly with the person who received the goods (2); and in the investigation of this question, if it should appear, (as it did in the last cited case), (3) that such person was debited in the plaintiff's books, or that he had been applied to by the plaintiff for payment, or that he had in a letter to the plaintiff admitted himself his debtor and promised payment at a certain time, (which statement was not contradicted or repudiated by the plaintiff,) these are very strong circumstances in support of the latter conclusion, namely, that the plaintiff considered the third person liable; in which case he cannot make the defendant also liable for the debt, without proof of a written memorandum.

Thus, where the plaintiff had delivered goods to one I. S. in consequence of a parol promise by the defendant in these words, "I will pay you, if I. S. will not," (which undertaking was before the delivery of the goods,) and it appeared further, that I. S. had been entered as the debtor in the plaintiff's books, the Court were of opinion, that the case was

(1) By Holt. C. J. in his judgment in Bucknyr v. Darnall, 2 Ld. Raym. 1087. 1 Salk. 27. S. C.

(2) Anderson v. Hayman, 1 H. Bl. 120. Browning v. Stallard, 5 Taunt. 450.

(3) See also Matson v. Wharam, 2 T R. 80.

clearly within the statute. (1) There, the very terms of the undertaking, independently of the circumstance of I. S. having been debited, manifestly shewed, that the defendant intended only to be answerable in case of the default of I. S., and that the plaintiff was in the first instance to look to I. S. as his debtor; and this was the view in which the Court considered the case. And with respect to the other fact in that case, namely, the fact of the undertaking being antecedent to the delivery of the goods, it may be observed, that the question, as to the person to whom credit is given, is rendered more doubtful, when the undertaking is before, than when it is after the delivery. If the undertaking was after the delivery, it cannot have the effect of transferring to the defendant the credit, that was given to the third person at the time of the delivery; if it was before, it is a circumstance to raise a presumption, that the goods were furnished on the credit of the promise; and, if nothing should appear in the terms of the undertaking, or in any other part of the transaction, to induce a contrary presumption, it might warrant the jury in concluding, that they were furnished on the credit of the defendant (2): but it is only a circumstance, and cannot be considered as in any manner conclusive upon the question. (3) Sect. 4.

A promise to pay money due from I. S., in consideration that the plaintiff would not sue I. S. for the debt (4), or that he would stay the suit if already commenced against him (5), is clearly within the statute, and cannot be made the subject of an action without proof of a written promise to that effect. So a promise to pay damages, which the plaintiff had sustained from an injury done to his horse by a third person, in consideration that the plaintiff would not sue that person, has been held to be a collateral promise, and not binding without a written memorandum. (6) But if the plaintiff were

(1) Jones v. Cooper, Cowp. 227.
(2) See Harris v. Huntbark, 1 Burr. 373.
(3) See Keate v. Temple, 1 Bos. & Pull. 158.
(4) Rothery v. Curry, Bull. N. P. 281. King v. Wilson, 2 Str. 873.
(5) Fish v. Hutchinson, 2 Wils. 94.
(6) Kirkham v. Marter, 2 Barn. & Ald. 613.

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to commence a suit against I. S., not for the recovery of a debt, but for some other cause (as, for an assault, &c.), and the defendant, in consideration that the plaintiff would withdraw his record in that suit, promise to pay a sum of money together with the plaintiff's costs, this would not be a promise to answer for the debt, default, or miscarriage of I. S. within the meaning of the statute; for the cause not being tried, I. S. does not appear to have been guilty of any default or miscarriage, or to be liable to the particular debt, damage, or costs; but it is an original undertaking, upon which an action will lie, although the promise was by parol. (1)

Where the defendant undertakes, that if the plaintiff would deliver up to him a fund in his possession adequate to the discharge of certain incumbrances, which have been brought upon it by a third person, he would pay off the incumbrances, this is not such an undertaking as requires a written memorandum within the meaning of the statute, although the discharge of the third party may eventually follow. (2) Upon this principle, the case of Castling v. Aubert (3) was determined, where the plaintiff (a broker) having a lien on some policies of assurance effected for his principal, for whom he had given his acceptances, the defendant promised in consideration of his giving up the policies, that he would provide for the payment of those acceptances, as they became due; and the Court held, that the plaintiff might recover for the breach of this agreement, though not in writing. So, in the case of Williams v. Leper (4), where the defendant, being employed as broker to sell the effects of a tenant of the plaintiff for the benefit of his creditors, made a verbal promise to the plaintiff, who was about to distrain the goods, that he would pay the arrears of rent, if the plaintiff would desist from distraining, the Court of King's Bench were of opinion, that

(1) Read v. Nash, 1 Wils. 305. Stephens v. Squire, 5 Mod. 205. S.P. and see 3 Burr. 1889. Goodman v. Chase, 1 Barn. & Ald. 297.

(2) 2 East, 332.

(3) 2 East, 325.

(4) 3 Burr. 1886. And see Houlditch v. Milne, 3 Esp. N. P. C. 87. Barrell v. Trussell, 4 Taunt. 117.

the plaintiff was entitled to recover upon this promise. So, where a verbal agreement was entered into between the defendant and several creditors of an insolvent person, by which the defendant agreed to pay the creditors so much in the pound in satisfaction of their debts, which they agreed to accept and to assign their debts to the defendant, this was considered not as an agreement to answer for the debts of the insolvent, but as the purchase of the debts of the several creditors, which is not prohibited by the statute of frauds. (1) Sect. 4.

A verbal promise by the defendant, to pay the plaintiff for his having provided necessaries for a third person, will be binding, where the defendant was under a legal obligation to provide necessaries; as in the case of Watson v. Turner (2), a pauper having been taken suddenly ill, and the plaintiff, an apothecary, having been called in by the pauper's son to attend the pauper without the previous request of the overseers, it was held, that a subsequent parol promise by one of the overseers of the parish, to which the pauper belonged, to pay the plaintiff for his attendance, was binding upon the overseers.

Agreement in consideratio of marriage.

Secondly, "*No action shall be brought to charge any person upon any agreement made upon consideration of marriage*, unless the agreement upon which, &c." In the case of Philpot v. Wallet (3), it was determined on a special verdict, after much consideration, that mutual promises to marry are within the words and intent of the statute; and it is laid down in Ch. B. Comyns's Digest (4), that if there be a promise of marriage, there must be a memorandum in writing, as well as where the

(1) Anstey v. Marden, 1 New Rep. 124.

(2) Bull. N. P. C. 129. The ground of the decision is there said to be, that overseers are under a moral obligation to provide for the poor. The true ground seems to be, that they are under a legal obligation. See 2 East, 506.; and 3 Bos.& Pull, 250., in note. Lamb v. Bunce, 4 Maule & Selw. 275. Wing v. Mill, 1 Barn. Ald. 104. In the last-cited case, the pauper resided, during his illness, out of the parish to which he belonged.

(3) Reported in Skin. 24., as of Mich. T. 33 C. 2., and said to be adjourned, North C. J. being absent. S. C., reported in 3 Lev. 65. as of Hil. T. 34 C. 2.

(4) Tit. Action on Case upon Assumpsit (F 3.), citing the case in 3 Lev. 65.; and referring to Harrison v. Cage as contra.

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promise is for payment of money upon marriage. However, there are authorities to the contrary. Mr. Justice Buller in his law of nisi prius states generally (1), that mutual promises to marry are not within this act, which relate only to contracts in consideration of marriage: and the case of Cork v. Baker (2) is referred to as an authority. That was an action of assumpsit on a promise to marry the plaintiff, in consideration of a promise by the plaintiff to marry the defendant; and on a motion in arrest of judgment after a verdict for the plaintiff, the Court held, that this parol promise was not within the statute of frauds, which relates only to contracts in consideration of marriage, and that the case in 3 Lev. 411.* has been contradicted by later resolutions. The principal question before the Court in that case seems to have been, whether a promise of marriage was a sufficient consideration to support an action of assumpsit; the other question, namely, whether mutual promises by parol are binding, could not properly come before the Court on a motion in arrest of judgment; for, even supposing that the declaration ought to have stated the promise to be in writing, (which, however, was not necessary,) still such a defect would be cured after verdict. Another authority, frequently cited in support of the position, that mutual promises of marriage are not within the statute, is the case of Harrison v. Cage (3); in the report of which, by Lord Raymond, the point is said to have been so ruled by Ward C. B. on the trial of the cause, and it is added, that it was said at the bar, "that the statute intended only agreements to pay marriage portions, and that it had often been ruled so by Lord Ch. J. Holt," which, as the report states, Lord Holt did

(1) Bull. N. P. 280.

(2) 1 Str. 33.

(3) 1 Ld. Raym. 386. Carth. 467. S. C. 5 Mod. 411. S. C. 1 Salk. 24. S. C. After a verdict for the plaintiff it was moved in arrest of judgment, *on the ground of want of consideration*; and this point is the subject of the reports.

* The case in 3 Lev. 411. is Hall and Keene v. Potter, which was an action of debt on a bond conditioned to procure a marriage. The case of Philpot v. Wallet, which relates to the subject mentioned above, is in 3 Lev. 65.

not deny. (1) The better opinion, therefore, seems to be, that mutual promises to marry are not within the meaning of the statute, and, though not in writing, may be the subject of an action. Sect. 4

Thirdly, "*No action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them*, unless the agreement upon which, &c." The first section, as we have seen, relates to interests in, or out of, lands, tenements, &c. actually made or created; this clause of the fourth section relates to a contract or sale of an interest in them. A lease of land is within the first section, unless in some particular cases excepted by the second section; an assignment of a lease is within the third section; and an agreement for the assignment of a lease, or for letting in an under-tenant, is within the fourth. (2) With respect to the first particular mentioned in this clause, namely, *contract or sale*, it has been determined, and seems now to be settled, that a sale of land by auction is a sale within the statute. (3) Agreements for the sale of lands, or for the grant of a rent charge, or of a right of common, are contracts for land or tenements, or for an interest in or concerning them; and an action cannot be brought upon them, unless they are in writing. An agreement by parol between parties, in the course of a proceeding before an arbitrator, that he shall determine as to a lease to be granted, is within the statute of frauds, and the award, having directed a lease to be made, cannot be enforced. (4) An agreement for a mere easement in land or tenements, (as, for the liberty of using a way over another person's close, or for nailing the fame-work of a skylight

Contract or sale of lands, &c.

(1) S. P. so ruled by King C. J. at Maidstone Ass. 1 G.; cited in Com. Dig. tit. Action on Case upon Assumpsit, (F 3.)

(2) Anonym. 1 Ventr. 361. 12 East, 514.

(3) Ruled by Eyre C. J. in Stansfield v. Johnson, 1 Esp. N. P. C. 102. S. P., ruled by Eyre C. J. in Walker v. Constable, 2 Esp. N. P. C. 659., and afterwards admitted by the Court of C. P. on motion to set side a nonsuit in the same case, 1 Bos. & Pull. 306. S.C., cited by the Master of the Rolls in Buckmaster v. Harrop, 7 Ves. 345. S. P., determined by the Master of the Rolls in Blagden v. Bradbear, 12 Ves. 466. S. P., admitted in Emmerson v. Heelis, 2 Taunt. 38., and see 9 Ves. 249. 13 Ves. 36.

(4) Walters v. Morgan, 2 Cox. Cas. Ch. 369.

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against the wall of his house;) (1) does not convey an interest in the property, and will be binding by parol.

An agreement for an abatement of the rent of lands is clearly within the statute. (2) So, an agreement for a crop growing upon land, conferring an exclusive right to the land during the growth of the crop for the purpose of making a profit of the growing surface: as, where the agreement was for the purchase of a crop of mowing grass, growing in a close of the defendant; the grass to be mowed and made into hay by the plaintiff; and no time fixed for the commencement of the mowing, this has been determined to be a contract for the sale of an interest in or concerning land. (3) But where the one party agreed to sell the other a crop of potatoes in a close, at so much for the sack, to be got immediately, the Court considered the contract as confined to the sale of the potatoes, and that it did not convey an interest in the soil, but merely an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes. (4)* And in the later case of Warwick v. Bruce (5),

(1) Winter v. Brockwell, 8 East, 310. n. 11 East, 366.

(2) O'Connor v. Spaight, 1 Scho. & Lef. 306.

(3) Crosby v. Wadsworth, 6 East, 602. 2 Maule & Sel. 208.

(4) Parker v. Staniland, 11 East, 362.

(5) 2 Maule & Sel. 205. The contract was made about that time of year, when such crops are usually dug up.

* It is difficult to distinguish this case from that of Emmerson v. Heelis (2 Taunt. 38.), in which the Court of Common Pleas were of opinion, that a sale by public auction, of several lots of turnips then growing, was a sale of an interest in land. Mansfield C J., who delivered the judgment of the Court, said shortly, that "on this point the case could not be distinguished from the case of hops before decided in the Common Pleas," referring to Waddington v. Bristow, (2 Bos. & Pull. 452.) The question there was, whether a contract to buy all the hops growing on certain land at so much by the hundred weight, to be delivered in packets to the buyers, was exempted from an agreement-stamp by the stat. 23 G. 3. c. 58. s. 4., as an agreement *made for, or relating to, the sale of goods, wares, and merchandizes;* and the Court held, that the contract was not within the exemption.

where the contract was for all the potatoes growing on a certain quantity of land, at so much per acre, to be dug and carried away by the purchaser, the Court held that the potatoes were the subject-matter of the sale, and that the contract was for a mere chattel. Sect. 4.

Fourthly, "*No action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof,* unless the agreement upon which, &c.". This clause applies to those cases only, where the thing is not to be performed within a year, by the express agreement between the parties. Cases depending upon contingencies, which may or may not happen in the course of a year from the time of making the agreement, are not within the statute; as, an agreement to pay a sum of money upon the return of a certain ship (1), or on the day of marriage of the party (2), or an agreement to give a legacy by his last will and testament. (3) In the first of these cases, the ship might by possibility have returned within the year; in the others, the marriage might have taken place, or the death of the party might have happened within that time. And though the contingency, upon which the money was to be paid, did not happen in either case, till after the expiration of a year, yet the promise was adjudged to be binding without any memorandum in writing. Where the agreement is to be performed upon a contingency, and it does not appear from the agreement, that it is to be performed after the year, then a note in writing is not necessary, for the contingency might possibly happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note in writing is necessary. (4) In other words, the clause in the statute includes only those cases, in which it is expressly stipulated, or in which it appears to be

Agreement not to be performed within a year.

(1) Anonym. case stated by Treby C. J., as the opinion of all the Judges. 1 Salk. 279.

(2) Peter v. Compton, Skin. 353. 1 Ld. Raym. 316. Francam v. Foster, Skin. 326.

(3) Fenton v. Emblers, 3 Burr. 1278. 1 Black. Rep. 353. S. C. Bull. N. P. 280. S. C.

(4) Resolution of the majority of the Judges, in Peter v. Compton, Skin. 353.

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the understanding of the parties as collected from the terms of the agreement, that the contract is not to be performed, that is, completed within the period of a year. (1)

Agreement, or some memorandum, &c. to be in writing.

No action shall be brought, whereby to charge, &c. *unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.*

1. Subject-matter of agreement.

First, with respect to the subject-matter of the writing. Whatever constitutes an essential part of the agreement ought to be expressed, and with sufficient certainty. In the construction of this clause, it has been determined that the word "*agreement*" must be understood in its proper and correct sense; and that, as the consideration of the promise is part of the agreement, this ought to be stated in writing, as well as the promise itself. Thus, in an action against the defendant upon his promise to pay the debt of a third person, in consideration of the plaintiff's forbearance to sue, the plaintiff cannot recover, unless there is a written memorandum of such consideration. (2) This strict construction of the act, by making it necessary to produce written evidence of the terms, by which the parties meant to be bound, is manifestly best calculated to give effect to the intention, which the legislature had in view, of securing the parties from being charged merely by parol testimony. A letter, therefore, by one of the contracting parties, admitting that he made a parol agreement, but not containing the terms, is not sufficient evidence of an agreement to charge the party. (3) So, a written agreement for a lease under a certain rent ought to specify the term, for which the premises are to be demised (4), or at least ought to refer to some other written instrument, by which the extent

(1) Boydell v. Drummond, 11 East, 142. 156, 157. 159. Bracegirdle v. Heald, 1 Barn. Ald. 722.

(2) Wain v. Warlters, 5 East, 10. As to this case, see Ex parte Minet, 14 Ves. 190. Ex parte Gardom, 15 Ves. 287. Goodman v. Chace, 1 Barn. Ald. 299.

(3) Seagood v. Meale, Prec. Ch. 560. 1 Atk. 12. 9 Ves. 250. 252. 11 Ves. 555.

(4) Clinan v. Cooke, 1 Scho. & Lef. 22.

of the term may be ascertained. And as the word agreement implies the assent of two or more persons, it is clear, that the contracting parties ought to be named, or the agreement cannot be enforced. (1) Sect. 4.

However, the words of the statute are not to be construed so strictly, as to make it necessary to state precisely, in the memorandum of the agreement for paying the debt of another person, what is the exact amount of the debt: but it will be sufficient to engage to pay generally, for all the goods furnished within a certain time, or whatever sum the person may owe, &c.; and the amount of the goods furnished, or of the debt contracted, is to be ascertained by evidence at the trial. (2) In a late case of this kind, where the promise to pay was made by the defendant in a letter addressed by him to one G., in which he undertook, in case G. would give the bearer D. W. indulgence for a certain time, to see him paid, the Court of King's Bench were of opinion, that the evidence of G. had been properly admitted to prove, what was the amount of the debt, and also that the defendant had applied to him as the attorney of the plaintiff, who employed him to sue D. W. for the debt. (3)

Secondly, the agreement, or some memorandum or note of the agreement, is required to be in writing. And here the question arises, what is a memorandum or note of agreement within the meaning of the statute. 2. What writing sufficient.

It seems to be clear that a writing may be used as evidence to establish an agreement, although from the disability of one of the parties it may have been void as a legal instrument from the time of its creation, or may have since become void in consequence of a new relation acquired by the party; as, in the case before mentioned of White against Cuyler, in an action of assumpsit for wages, a deed executed by the

(1) Charlewood v. D. of Bedford, 1 Atk. 497. Champion v. Plummer, 1 New Rep. 252.

(2) 15 East, 274. Stadt v. Lill, 1 Campb. 242. 9 East, 348. S. C. 1 Scho. & Lef. 52. 73.

(3) Bateman v. Phillips, 15 East, 272. Morris v. Stacey, 1 Holt, 153.

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wife of the defendant, though void as the deed of a married woman, was yet admitted for the purpose of shewing the terms of the contract (1); and a bond by a single woman, conditioned to convey her estate to her intended husband in case of their marriage, has been allowed to be good evidence of the agreement in equity, on a bill against the heir of the wife for a specific performance, though the bond became void in law upon their intermarriage. (2)

Agreement contained in several papers.

Further, it is not necessary that all the terms or essential parts of the agreement should be contained in a single paper. The statute only enacts, that they shall be in writing; and does not require them to be specified by a single instrument. It is, therefore, the common practice to establish contracts by the evidence of several writings; and those writings need not be contemporaneous with the contract. They ought, however, to be connected, or have a plain reference to each other by their contents, or by the context, or at least by writing (3); they cannot be connected by mere parol evidence. Without some reference of this kind, the one cannot be received to support the other, as evidence of the same transaction. Thus, where A. by public advertisement offered lands to be let for a certain term, in consequence of which a proposal was made by B. and accepted, and an agreement was drawn up in writing between A. and B. specifying the premises and the amount of the rent, but not stating the term for which the premises were to be demised, nor in any manner referring to the advertisement, it was determined that parol evidence was not admissible, in order to shew the connection of these two writings, and that this defective agreement could not be enforced on a bill for specific performance. (4) So, a minute made in a catalogue of sale at a public auction cannot

(1) 6 T. R. 176.

(2) Cannel v. Buckle, 2 P. Wms. 242.

(3) 1 Ves. jun. 326. 1 Scho. & Lef. 33. 9 Ves. 250. 12 Ves. 471. 11 East, 157. Gordon v. Trevelyan, 1 Price, 64. Ogilvie v. Foljambe, 3 Merivale, 61.

(4) Clinan v. Cooke, 1 Scho. & Lef. 22. 33.

be coupled or incorporated with the conditions of sale, in order to make a complete memorandum of the agreement, unless the catalogue itself is annexed to the conditions, or has some internal reference to them. (1) Sect. 4.

But if the agreement in the above-mentioned case of Clinan v. Cooke had referred to the advertisement, parol evidence might in that case have been admitted, to shew what was the thing, namely, the advertisement, referred to; for then it would be an agreement to grant for so much time as was expressed in the advertisement, and the identity of the advertisement might be proved by parol evidence. (2) There are several reported cases to this effect. In an action against the defendant for not accepting a lease according to his agreement, it appeared that a draft of the lease had been perused and altered by the defendant's attorney, but was not signed: the defendant afterwards wishing to relinquish the agreement, wrote a memorandum on the back of the draft, as an authority for the plaintiff to let the premises to any other person, by which memorandum he admitted that he had entered into the agreement; the memorandum was signed by him, and this was held to be a sufficient signature to bind the defendant. (3) So, in the case of Allen v. Bennett (4), (where the question arose upon the seventeenth section,) the Court of Common Pleas determined, that an order for goods, which had been written and signed by the seller (the defendant) in a common memorandum-book of the buyer (the plaintiff), but which did not contain the name of the buyer, might be properly connected with a letter of the defendant to his agent mentioning the name of the plaintiff as buyer and also with a letter of the plaintiff to the defendant, claiming the performance of the order.(5)

(1) Hinde v. Whitehouse, 7 East, 558. And see Boydell v. Drummond, 11 East, 142. 157. Both these cases are on the 17th section of the statute; but applicable also to the 4th.

(2) 1 Scho. & Lef. 33. 12 Ves. 471. Gordon v. Trevelyan, 1 Price, 64.

(3) Shippey v. Derrison, 5 Esp. N. P. C. 190.

(4) 3 Taunt. 169. 175. And see Saunderson v. Jackson, 2 Bos. & Pul. 238. 9 Ves. 250. 253.

(5) S. P. by Ld. Hardwicke in Welford v. Beazeley, 3 Atk. 503. Smith v. Watson, Bunb. 55. And see Rose v. Cunynghame, 11 Ves. 550

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Where a letter of one of the contracting parties is referred to, for the purpose of supplying the want of his signature in the memorandum of the contract, there ought not only to be a plain reference and connection between the writings, apparent from their context or their superscription, or the like, without the aid of extrinsic evidence, but the letter itself ought to recognize and adopt the agreement as concluded and binding. (1) In the case of Tawney v. Crowther (2), an agreement for the purchase of a house had been reduced into writing, and the defendant promised to sign it on a particular day; in consequence of his delay, the plaintiff wrote a letter, in answer to which the defendant said, "there would be time to settle every thing before the day for delivering possession, and that his word should always be as good as any security." Lord Thurlow considered the defendant's letter as clearly referring to the unsigned memorandum of agreement, which was then in his possession, and that it contained a promise to perform the agreement: he admitted, "that if the defendant had meant only to treat further, it would not have taken the case out of the statute." The doubt in this case seems to have been, whether the letter referred sufficiently to the paper containing the terms; and whether the defendant's word was that he would execute the agreement. (3) *

(1) Cooper v. Smith, 10 East, 107. Kent v. Huskinson, 3 Bos. & Pull. 233. 3 Atk. 503. Huddlestone v. Briscoe, 11 Ves. 591.

(2) 3 Bro. C. C. 318.

(3) 3 Ves. 713.

* The decree in the case of Tawney v. Crowther was in favour of the plaintiff; yet Lord Thurlow gave the defendant his costs, provided he consented to deliver up possession within a certain time, intimating that he did so, in order to secure against an appeal, the property being small. "This circumstance," says Lord Redesdale, observing upon the case in Clinan v. Cooke, (1 Scho. & Lef. 34.) "shews that he considered it a doubtful case, otherwise it would be extraordinary, that the defendant should have his costs, where he was wrong." "I have often discussed that case," continued Lord Redesdale, "and never could bring my mind to agree with Lord Thurlow's decision, for this reason, he considered the letter tantamount to a signing of the agreement, I thought the true meaning was, 'I will not bind myself, but you shall rely on my word.'"

Sect. 4. Agreement to be signed.

Another requisite is, that the agreement, or some memorandum or note of the agreement, should be signed. It will not be sufficient to shew, that the draft of the agreement was read over to the defendant at his desire (1), or that it was reduced into writing by a person present at the time of making the agreement (2), or even that the defendant perused and altered the draft (3); for the statute expressly requires the writing to be signed. But if there is a signing, that is, such an insertion of the party's name as will authenticate the instrument, it is in general immaterial in what part of the instrument the name is found, whether at the beginning or at the end. (4) The object of the signing is to authenticate the writing, not to identify the party. (5) It has been decided, that a writing purporting to be an agreement between the plaintiff and A. B. the defendant, for the sale of certain premises, written by the defendant, and beginning thus: "I A. B. agree to sell to, &c.," is a writing sufficiently signed to charge the defendant, though he has not signed at the bottom of the paper. (6) And, in the case of Saunderson v. Jackson (7), Lord Eldon Ch. J. alluding to that decision, is reported to have said, "If a man draw up an agreement in his own hand-writing, beginning, 'I A. B. agree, &c.,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute; and yet, he adds, it is impossible not to see that the insertion of the name at the beginning was not intended to be the signature, and that the paper was meant to be incomplete, until it was further signed." (8)

Whether it will be sufficient, that the defendant's name is mentioned in the body of the memorandum of agreement, (even supposing the memorandum to be drawn up by the defendant himself,) seems to be rather doubtful. (9) In the

(1) Cooper v. Smith, 15 East, 103. Wright v. Dannah, 2 Campb. 203.

(2) Gunter v. Halsey, Ambl. 586. Whitchurch v Bevis, 2 Bro. C. C. 559. And see Champion v. Plummer, 1 New Rep. 252.

(3) Hawkins v. Holmes, 1 P. Wms. 770. Shippey v. Derrison, 5 Esp. N. P. C. 190.

(4) Ogilvie v. Foljambe, 3 Merivale, 62.

(5) Selby v. Selby, 3 Merivale, 6.

(6) Knight v. Crockford, 1 Esp. N. P. C. 189. This writing was attested. See 9 Ves. 248, 249; and 3 Merivale, 2.

(7) 2 Bos. & Pull. 239.

(8) See Right dem. Cater v. Price, 1 Doug. 241; and Selby v. Selby, 3 Merivale, 2.

(9) 9 Ves. 253.

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case of Stokes v. Moore (1) the question was, whether instructions for the renewal of a lease, written by the defendant, (in which among other things he stated, what rent was to be paid to himself by name,) could be considered a note or memorandum of agreement signed by the defendant; the Court of Exchequer were unanimously of opinion, that "the signature required by the statute is to have the effect of giving authenticity to the whole instrument; and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found — as in the formal introduction to a will — but it cannot be imagined, that a name inserted in the body of the instrument, and applicable to particular purposes, will amount to such an authentication as the statute requires."

A memorandum of agreement, written by the defendant with his name printed, will be as binding as if his name were written (2); by writing the other parts, he recognises and adopts the printed name as his own. And if the party, charged with an agreement, has signed it knowing its contents, though he sign it as witness, yet this is a signing sufficient to bind him. (3) It has been before mentioned, that a party who has been treating for a lease, is not bound by having perused and altered the draft of the lease; for the statute requires a signing. But it will not be necessary that the signature should be in the draft; if he recognises the draft of the lease as his agreement, by indorsement on the draft (4), or by a letter or memorandum referring to the draft (5) which indorsement or memorandum is signed by him, this will be a sufficient signing within the meaning of the statute.

Signature by party charged, &c.

Further, the agreement, or memorandum or note of the agreement, is to be signed *by the party to be charged therewith*,

(1) 1 P. Wms. 770. n. (1), 1786, in Exch. 1 Cox's Cas. 222. S. C. reported more at length.

(2) Saunderson v. Jackson, 2 Bos. & Pull. 239. Schneider v. Norris, 2 Maule and Sel. 286. These cases arose on the 17th section.

(3) Welford v. Beazeley, 3 Atk. 503. 9 Ves. 291.

(4) Shippey v. Derrison, 5 Esp. N. P. C. 191.

(5) Blagden v. Bradbear, 12 Ves. 466.

or some other person thereunto by him lawfully authorized. Two questions arise here; first, as to the party, who ought to sign; secondly, who is a person authorized to sign for him. Sect. 4.

With respect to the first question, it appears to be settled, that a memorandum of agreement naming both parties, but signed by one alone, will bind that party who signs. (1) But unless the memorandum state both the contracting parties, the purchaser as well as the seller, it will not of itself be sufficient to bind the one named, though he has signed it. (2) Thus where a person makes a minute of a contract in the common memorandum-book of another, stating himself to be the seller, and signs it, but does not name the other person, this will not be sufficient to bind him in an action brought by the other as buyer. (3) However, this omission of the signature of the other party may in many cases be supplied by his letter, or other papers referring to the same transaction. (4) And, in the case of Allen v. Bennett above cited, if the memorandum of the contract had been inserted in the regular order-book of the plaintiff (the buyer), and if the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, had been consonant and consistent, perhaps it would not have been too much to infer, that the entry was made by the authority of the owner of the book, for the purpose of evidencing the sale. (5) 1. Signing by the party.

Secondly, the agreement is to be signed by the party charged, *or some other person thereunto* (that is, to the signing,) (6) *by him lawfully authorized.* It is clearly settled, that the agent of the party need not be appointed by writing (7); 2. Signing by some one authorized.

(1) Hatton v. Gray, 2 Ch. Cas. 164. Coleman v. Upcott, 5 Vin. Ab. 527. pl. 17. Cotton v. Lee, cited in Seton v. Slade, 7 Ves. 265. Fowle v. Freeman, 9 Ves. 351. Wain v. Warlters, 5 East, 10. Saunderson v. Jackson, 3 Bos. & Pull. 238. Egerton v. Matthews, 6 East, 307. Allen v. Bennett, 3 Taunt. 169. 175. See Lawrenson v. Butler, 1 Scho. & Lef. 20.; 11 Ves. 592.; 3 Ves. & Beam. 187.

(2) Champion v. Plummer, 1 New Rep. 252. Klinitz v. Surry, 5 Esp. N. P. C. 267. Cases on the 17th section.

(3) Allen v. Bennett, 3 Taunt. 169.

(4) Western v. Russell, 3 Ves. & Beam. 187. And see ante, p. 454.

(5) 3 Taunt. 175., by Mansfield C. J.

(6) 1 Ves. & Beam. 207.

(7) Coles v. Trecothick, 9 Ves. 250.

Sect. 4. such an appointment is not required by the fourth section, as it is by the first and third, which relate to the creation or assignment of estates. The memorandum cannot properly be signed by one of the contracting parties, as the authorized agent of the other; the agent must be a third person. (1)

An auctioneer, attending at the public sale of an estate, is undoubtedly the agent of the seller: and his receipt for the deposit will be a sufficient note or memorandum of the agreement, provided he states the terms and other essentials, or else refers to some other writing by which they may be ascertained. (2) But although he is an agent authorized to sell at a particular price, and to sign for the principal, yet his clerk is not authorized to sell in his absence without the consent of the principal. (3)

An auctioneer appears also to be properly considered an agent for the purchaser. In the case of Stansfield v. Johnson (4), Eyre C. J. ruled the contrary; but this opinion at nisi prius seems to be overruled by the case of Emmerson v. Heelis (5), and White v. Proctor. (6) In each of those cases, the auctioneer set down the name of the highest bidder in a bill or particular of sale; and the Court of Common Pleas were of opinion, that this was a memorandum in writing signed by an agent of the purchaser, against whom the action was brought. "By what authority," said Ch. Justice Mansfield in the first case, "does the auctioneer write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings so loud and particular, as to be heard by the auctioneer. For what pur-

(1) Wright v. Dannah, 2 Campb. 203.

(2) Blagden v. Bradbear, 12 Ves. 471. 13 Ves. 475. 7 East, 569.

(3) Coles v. Trecothick, 9 Ves. 234. 243. See also Blore v. Sir R. Sutton, 3 Merivale, 237.; in which one of the points was as to a signing by the agent's clerk.

(4) 1 Esp. N. P. C. 102., cited as to this point by the Master of the Rolls in Buckmaster v. Harrop, 7 Ves. 345. The point does not appear to have arisen in Walker v. Constable, 2 Esp. N. P. C. 659. 1 Bos. & Pull. 306. S. C.

(5) 2 Taunt. 38.

(6) 4 Taunt. 209. Kemeys v. Proctor, 3 Ves. & Beam. 57 S. P. And see 1 vol. of Cases and Opinions, 143.; and Hinde v. Whitehouse, 7 East, 558. 569. Coles v. Trecothick, 9 Ves. 349.

pose is this done? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser." It appears from the same case (1), that the auctioneer is duly authorised to sign, although the purchaser has an agent to bid for him at the sale. Sect. 17.

The seventeenth section of the statute of frauds enacts, "that no contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Sect. 17.; as to sale of goods.

An agreement to sell goods for a certain price to be paid on delivery would have been a valid contract, according to the rules of common law; so that if the buyer had made a regular tender of payment at the appointed time, or, if no time were fixed, within a reasonable time, and the other party had refused to deliver, he might have brought his action against the seller for a breach of the contract; or, if the seller had afterwards sold the goods to another person without any default in the first buyer, he would have been subject to an action of trover. But the rule of law is now altered by the statute of frauds, on a sale of goods for the price of ten pounds or upwards; in which case, the contract of sale will not be binding, unless one of the three requisites mentioned in this section has been strictly observed. Where indeed it is stipulated that the contract is not to be performed within the space of a year, there, as we have before seen, a written memorandum of the agreement is made necessary by the fourth section; and the giving of something in earnest, or in part of payment, would not be sufficient, it is presumed, in such a

(1) Emmerson v. Heelis, 2 Taunt. 38.

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case to dispense with that requisite. As, where the contract is to make a carriage at a certain price, and deliver it at the end of a year and a half, there a written memorandum is necessary, for the reason before mentioned; although, as will be presently shewn, no such memorandum would be absolutely necessary, if the stipulation, respecting the delivery after the year, were omitted.

Executory contracts.

On the construction of this section, an opinion at one time prevailed, that it did not apply to executory contracts, that is, to contracts not to be immediately performed. (1) In the case of Towers v. Sir J. Osborne (2), Ch. J. Pratt ruled, that an action would lie for the value of a chariot, which the defendant had bespoke and afterwards refused to take, though there was no written memorandum of the bargain, and no earnest; the Ch. Justice being of opinion, that this was not a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable, (unless time is given to him by special agreement,) and where the seller is to deliver the goods immediately. Yet it seems evident from the words used by the legislature, which are very general and extensive, that the provision was intended to comprehend executory as well as other contracts. Indeed, such a provision is peculiarly necessary in the case of executory contracts; because they are in their nature more likely than any others to be attended by that uncertainty and confusion, which it was the great object of the legislature to prevent. It has therefore been settled by the later authorities, that executory contracts for the sale of goods, wares, and merchandizes, to be delivered at a future time, to the amount specified, are within the meaning of the statute. (3)

(1) See the ground of the decision in Towers v. Sir J. Osborne, by Pratt C. J., 1 Str. 505. which was adopted by the Court of K. B. in Clayton v. Andrews, 4 Burr. 2101. S. P. Bull. N. P. 279. S. P. by the opinion of Yates J. in Simon v. Metivier, 1 Blac. Rep. 602. S. P. by Wilson J. in Alexander v. Comber, 1 H. Bl. 20. See 1 Taunt. 320.

(2) 1 Str. 505.

(3) Rondeau v. Wyatt, 2 H. Bl. 63. Cooper v. Elston, 7 T. R. Alexander v. Comber, 1 H. Bl. 20.

But still, it may be observed, that although one of the grounds (namely, the executory nature of the contract), upon which the decision in the case of Towers v. Sir J. Osborne partly proceeded, has been contradicted, yet the decision in that case has not been over-ruled, and may be supported on another ground. There the contract was not for the purchase of goods, but for the making of something, which had no existence at the time; it was a contract for work and labour to be done, and materials, &c. to be supplied, and distinguishable from a mere contract of sale, to which species of contract alone the statute is applicable (1); for the seventeenth section speaks of acceptance of part of the goods as one of the requisites to bind the bargain, and is supposed therefore not to extend to those cases in which the subject-matter of the contract is incapable of delivery and part acceptance. (2) So, in the case of Clayton v. Andrews (3), where the contract was for a quantity of wheat to be delivered some weeks afterwards, the wheat at the time of the contract being unthrashed, the Court of King's Bench were of opinion, on the authority of the last case, that the contract was binding, without any earnest or delivery of part, and without any written memorandum. Here also, as it has been observed, some alteration was to be made in the state of the commodity previous to the delivery (4); for it was necessary that the corn should be first thrashed. This perhaps may seem a very nice distinction; but still the work to be performed in thrashing made, though in a small degree, a part of the contract. In the case of Rondeau v. Wyatt (5), the defendant made a verbal contract to sell and deliver a certain number of sacks of flour to the plaintiff, to be put in sacks which the plaintiff was to send and to be shipped on board of vessels to be provided by him; and the Court of Common Pleas, after much consideration, were of opinion that the plaintiff could not recover, as the Sect. 17.

(1) See the opinion of Lawrence J. in Cooper v. Elston, 7 T. R. 17., and in Emmerson v. Heelis, 2 Taunt. 42.; and the judgment of Lord Loughborough in Rondeau v. Wyatt, 2 H. Bl. 67. See also Mucklow v. Mangles, 1 Taunt 320.

(2) Groves v. Buck, 3 Maule & Sel. 179. 1 Taunt. 320.

(3) 4 Burr. 2101.

(4) By Lawrence J. in Cooper v. Elston, 7 T. R. 17. and Eyre C. J. in Rondeau v. Wyatt, 2 H. Bl. 67

(5) 2 H. Bl. 67. Astey v. Emery, 4 Maule & Selw. 262.

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requisites of the statute had not been complied with. Here the subject-matter of the contract (the flour), though it was to be put into sacks and shipped by the defendant, was yet in a deliverable condition, and specifically the same article from the first to the last; in the other case, the corn was unthrashed, and not in a state capable of delivery.

Sale by auction.

Sales of real property by auction have, as was before mentioned, been frequently determined to be within the 4th section; and from reading the words of the 17th section, which are very general, and apply without exception to all contracts for the sale of goods, it might be supposed that sales by auction were intended no less than other kinds of sale. However, in the case of Simon v. Motivos (1), the Court of King's Bench inclined to be of opinion, that a sale of goods by auction was not within the statute. "The solemnity," said Lord Mansfield, "of that kind of sale precludes all perjury, as to the fact itself of sale." He added, "According to the inclination of my present opinion, auctions in general are not within the statute; but this is not necessary to be now determined." Mr. Justice Wilmot said, "It may be a great question, whether sales by auction are within the statute; I am inclined to think sales by auction, openly transacted before five hundred people, are not within the statute." Mr. Justice Yates said "I much doubt, whether the contract was within the statute of frauds." Mr. Justice Aston said nothing upon the point. The case was determined principally upon the ground, that the note of the auctioneer, mentioning the buyer's name and the price, &c. in the usual manner, was a memorandum of the bargain by him as agent of the buyer; and another circumstance, namely, that the goods were on the day after the bidding weighed out to the buyer's servant, was thought to be very material. Upon the whole, the question seems not to be completely settled by the case of Simon v. Motivos, which, it may be observed, was antecedent to those before mentioned upon the fourth section. The point was very little considered; and the plain construc-

(1) 1 Black. 599. 3 Burr. 1922. S. C. The report in Burrow is very short, and merely notices the point, adding that the Court inclined to be of this opinion.

tion of the statute most clearly applies to all contracts for the sale of goods, as well those at a public auction as by private sale. Sect 17.

The observations on this subject in a late case (1) are extremely strong, and deserving of the greatest consideration. "With all deference to these opinions," said Lord Ellenborough, alluding to the opinions in the case of Simon v. Motivos, "I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing in a statute applying without exception to all sales of goods above the value of 10l., merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt; and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance; which opens a door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the place of sale; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to say that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary: neither is it necessary that I should, upon the present occasion."

Acceptance of part, &c.

The case mentioned by the statute, in which a written memorandum will not be required, is where the buyer *accepts part of the goods sold, and actually receives the same, or gives something in earnest to bind the bargain, or in part of payment*. The acceptance here intended is the ultimate acceptance, such as completely affirms the contract. (2) An acceptance of a sample will in many cases be an acceptance of part of the

(1) Hinde v. Whitehouse, 7 East, 568.

(2) 3 Bos. & Pull. 233.

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goods sold. This must depend upon the manner in which the sample is taken. If the sample by the terms of the contract is to be considered as a part of the purchase to make up the quantity, and is delivered as such, it is clearly an acceptance of part of the goods; although the sample may also be partly delivered as a specimen of quality (1): but it will be otherwise, where the sample is delivered merely as a specimen, and not taken as part of the goods. (2)

Symbolical acceptance.

Where the goods are ponderous, and incapable of being handed over from one to another, there needs not be an actual delivery; but it may be done by what is tantamount, as by the delivery of the key of the warehouse, in which the goods are lodged, or by delivery of other symbols of property. (3) The delivery of the muniments of a ship is equivalent to the delivery of the ship itself, as the delivery of the keys of a warehouse is a delivery of the goods in it. (4)

An order by the vendor of goods to a wharfinger to deliver them to the buyer, is sufficient to pass the property to the buyer, provided nothing remains to be done but to make the delivery. (5) Where an order for the delivery of the goods had been given by the seller to the buyer, requiring his warehouseman to deliver the goods to the buyer, which was afterwards countermanded, this was such an acceptance, as would entitle the buyer to maintain an action against the seller for breach of the contract, without any written memorandum. (6) But where something is required by the order, to be done previous to the delivery, as, where the order to the wharf-

(1) Hinde v. Whitehouse, 7 East, 558. Talver v. West, Holt, N. P. C. 178. Blenkinson v. Clayton, 1 Moore, C. P. 328.

(2) Cooper v. Elston, 7 T. R. 14. Klinitz v. Surry, 5 Esp. N. P. C. 267.

(3) By Lord Ellenborough C. J. 1 East, 1094. 1 Taunt. 460.

(4) By Lord Hardwicke, 1 Atk. 171. The cases on the subject of a constructive delivery are fully and clearly arranged in Bell's Commentaries on the Commercial Laws of Scotland, vol. i. p. 60.

(5) By Gibbs Ch. J. Withers v. Lys, Holt, N. P. C. 20. and see Lucas v Dorrien, 7 Taunt. 289; where a written order on the wharfinger for delivery, communicated to him, and assented to by him, was held sufficient to pass the property.

(6) Searle v. Keeves, 2 Esp. N. P. C. 598.

finger is to *weigh and deliver*, there the transfer is not complete till that thing be done. (1) Sect. 1.

Where goods have been weighed and measured by order of the buyer, this has been thought a sufficient acceptance to bind him, in an action for goods sold and delivered. (2) So, if the buyer write his name on the goods at the time of the purchase, this will be evidence against him, that he intended to appropriate them to his own use, and if that was his intention, there is a sufficient delivery. (3) So where the defendant, having bought of the plaintiff a quantity of hay, sold part of it afterwards to another person, this was dealing with the commodity, as if it were in his actual possession, from which the jury might infer a delivery by the plaintiff, and an acceptance of the goods by the defendant. (4) And where the buyer, on the purchase of goods, desired the plaintiff (the seller) to keep them for him in his (the seller's) possession, (as, on the sale of horses, to keep them for him at livery in his stable,) and he accepted the order, this was held to be a sufficient delivery of the goods within the statute of frauds, and a written memorandum of the bargain was thought not to be necessary. (5)

Delivery to carrier.

A delivery of purchased goods to a carrier, named or appointed by the purchaser, to be carried by him and delivered to the purchaser, is equivalent to an acceptance by the purchaser himself, the carrier being here employed as his servant or agent; and a delivery to the carrier's servant in the course of business will have exactly the same effect. So, where goods have been verbally ordered by the defendant, and shipped by the vendor (the plaintiff) in the same manner as had been done in the course of previous dealings between the same parties, it has been held, that the defendant must be

(1) Shepley v. Davis, 5 Taunt. 622. The order to the wharfinger was the only authority that had been given for the delivery. Withers v. Lys, Holt, N. P. C. 18. S. P.

(2) By Wilmot J. 1 Blackst. 601. By Heath J. 1 Taunt. 459.

(3) Hodgson v Le Bret, 1 Campb. 233. Anderson v. Scott, ib. 235. n. 14 East. 312.

(4) Chaplin v. Rogers, 1 East, 192.

(5) Elmore v. Stone, 1 Taunt. 458.

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considered as having constituted the master of the ship his agent to accept and receive the goods; consequently, that the plaintiff is entitled to recover in an action for goods sold and delivered, without proving that the goods have ever come into the defendant's possession. (1) And where no previous dealings appear to have passed between the parties, and nothing has been said respecting the carriage by a particular carrier, it must be understood, that the goods are to be delivered in the most usual and convenient mode. (2)

One of the latest cases upon the subject of delivery, is the case of Astey v. Emery. (3) It appeared there, that a corn-factor at N. agreed to sell to the defendant some barley belonging to the plaintiff, which was then in the hands of a third person at N.; the corn was to be delivered at a warehouse of the corn-factor at D., and to go by his first boat from N. to D.; and the price agreed upon was higher, as the corn was to be delivered at his expence. The barley went accordingly by his first boat. Before it set off, the defendant desired the person, in whose hands it was, to see it measured, delivered, and put up properly; and a few days after the corn had been sent, the invoice was delivered at D. to the defendant, who requested time to pay, but afterwards refused to accept. It was contended, that there was an actual delivery in this case; but the Court of King's Bench held, that as the delivery was to be at D. the buyer had no right to take possession at N., and that there was not any acceptance of the goods within the meaning of the statute.

Contract for transfer of stock.

It has been doubted, whether contracts for the transfer of stock are within this section. The argument in support of the negative is, that the statute only applies to such goods or merchandize as can be delivered or accepted. On the other side, the answer is, that the thing contracted for needs not be of such a nature as can be delivered into the other party's

(1) Hart v. Sattley, 3 Campb. 528. by Chambre J.

(2) Dutton v. Solomonson, 3 Bos. & Pull. 583. King v. Meredith, 2 Campb. 639. Copeland v. Lewis, 2 Starkie, 33.

(3) 4 Maule & Selw. 262.

hands; but in that case, either earnest or a memorandum in writing will be sufficient. This point was argued in the case of Pickering v. Appleby before all the Judges, who were equally divided in opinion. (1) But in the case of Crull v. Dodson (2), where a broker pretended to have sold part of his employer's stock, (which was South-Sea stock,) and taken the residue at a certain price, and his employer filed a bill against him for the difference between that price and the current price as to what he had bought, Lord Chancellor King thought the sale fraudulent, and assigned as a reason, that earnest should have been taken, because the case had been determined to be within the statute of frauds. And in the case of Mansell v. Cooke (3), where a bill was filed for the specific performance of a contract for South-Sea stock, and the defendant insisted on the statute, the Chancellor seemed to be of opinion, that the case was within the statute, and said, it had been so held in many other cases; but he decided against the defendant's plea, because the pleading was bad.

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Note or memorandum of bargain.

If there is not any acceptance of part of the goods, nor any thing given in earnest to bind the bargain, the statute requires, that *some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized.* The only difference between this and the fourth section is, that by the fourth the memorandum of the *agreement* is to be in writing and signed by the *party* to be charged, or by some *person* authorized by him; here, the memorandum of the *bargain* is to be in writing signed by the *parties* to be charged or their authorized *agents*. The term "agreement," in the former, has been understood, as was before mentioned, in its correct legal sense, including the consideration of the promise as well as the promise itself; but in the construction of this clause, the term "bargain" is taken in a more general and common sense. Thus in an action for not accepting goods ordered by the defendant, if the

(1) See Colt v. Netterville, 2 P. Wms. 307. Mich. T. 1725.

(2) Sel. Cas. temp. King. 41. July, 1725.

(3) Prec. Ch. 575.

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memorandum specify the quantity of goods purchased, that has been thought sufficient, without also specifying the consideration or price to be paid. (1)

Signing.

With respect to the signature, the same construction has been put upon this section, as upon the fourth. A memorandum of the bargain, naming both parties and signed by the defendant, will be sufficient to bind him, although the other party has not signed, and consequently is not bound. (2) Where a broker acts between a buyer and seller, his signature is the signature of both parties (3); and an entry in his book, stating the sale of the goods from the one to the other, and signed by him, is a binding contract between the parties. The notes of the contract, called the bought and sold notes, which the broker usually copies out of his book, are intended as notices to inform the parties of the terms of the sale; but the contract is binding from the original entry made by the broker. (4)

An auctioneer, who presides at the sale of goods, is considered to be the agent of the purchaser as well as of the seller, and a memorandum of the bargain signed by him will be binding upon both parties. (5) This has been uniformly held, ever since the case of Simon v. Motivos. (6) As to the question, what is a sufficient memorandum of a sale by auction, several cases have been already cited with reference to the fourth section, which apply equally to the seventeenth. And

(1) Egerton v. Matthews, 6 East, 307. In this case, however, it is to be observed, the *rate of payment*, (namely, so much per pound,) was stated; and as this affords a medium for the calculation of the whole amount, it may properly be considered the same, as if the amount itself had been specified. This circumstance does not appear to have been noticed.

(2) See ante, p. 459.

(3) 7 East, 569. 3 Taunt. 173. Heyman v. Neale, 2 Campb. 337.

(4) Heyman v. Neale, 2 Campb. 337. In the case of Wright v. Dannah, 2 Campb. 203., Lord Ellenborough C. J. held that a note of sale, written by the plaintiff under the defendant's inspection, and containing the defendant's name, would not bind the defendant as a *memorandum signed by his agent*. There was not the least evidence in this case, that the seller of the goods had been authorised as agent to write down the name of the defendant (the purchaser).

(5) Simon v. Motivos, 1 Blac. 599. See ante, p. 464.

(6) See 7 East, 569. 2 Taunt. 43.

in addition to those cases that of Phillimore v. Barry (1) may properly be mentioned. There the auctioneer had written in the printed catalogue the initials of the name of the defendant's agent (to whom the goods were sold) together with the prices, opposite to the lots purchased by him, and the principal afterwards in a letter to the agent recognised the contract; and it was held, that the letter and the entry in the catalogue might be coupled together, and would constitute a sufficient memorandum of the bargain within the statute of frauds. Sect. 17.

Sect. II.

Of the Proof of Deeds and Agreements.

Subpœna duces tecum.

If any deed or other writing, necessary to be produced at the trial of a cause, is in the possession of a third person, the legal process for compelling him to produce it is by suing out a writ of subpœna ad testificandum, to enforce his personal attendance, and inserting a special clause, called a duces tecum, which specifies the writings required, and commands him to produce them at the trial. The writ of subpœna duces tecum, like some other writs of undoubted antiquity, is not to be found in the registrum brevium; but it can be traced in practice as far back as the time of Charles II., and probably existed much earlier, as such a compulsory process is essential to the constitution of courts of justice. A witness, served with this subpœna, is obliged to attend; and, though it will be a question for the consideration of the judge, whether he ought to be compelled to produce the writings in his possession, yet undoubtedly he ought to be ready to produce them, if ordered by the court; and, in case of disobedience without sufficient cause, will be liable to an attachment, or to a special action for damages. (2)

(1) 1 Campb. 513.
(2) Amey v. Long, 9 East, 473. Corsen v. Dubois, Holt, N.P.C. 239. Reed v. James, 1 Starkie, N.P.C. 132.

If the writing, which the witness is called upon to produce, would have a tendency to subject him to a criminal charge, or to a penalty (1), or any kind of forfeiture, the Court will excuse him from producing it, as well as from answering any question of the same tendency; but, from analogy to the rule respecting parol testimony, (and there seems to be no good reason for allowing a greater privilege in the one case than in the other,) he would not be excused from producing a paper in his possession, relevant to the matter in issue, on the ground that it might establish, or tend to establish against him the fact of his being in debt, or subject him to a civil suit. (2)

Party, when compellable to produce.

If writings are in the possession of a party to the suit, the other party has, in general, no means of compelling their production. In some instances, indeed, where the writing is deposited in the custody of a defendant, as a trustee for all parties interested, courts of law will order him to furnish the plaintiff with a copy, and produce the original at the trial. Thus, in an action for a stake won at an horse-race, the defendant, who was the stake-holder, was ordered to produce a copy of the racing articles, without which the plaintiff could not proceed. (3) So, in a late case, in an action of covenant, the Court of Common Pleas granted the plaintiff a rule for taking a copy of an indenture of assignment of a lease made between the plaintiff and defendant, as the only part of the indenture, which had been executed, was in the hands of the defendant (4); the parties, in this case, having executed one part only of the indenture, in order to save the expense of double stamps, the Court thought it a necessary consequence, that the party, who had the custody, undertook to produce the deed, when necessary, for the use of the other contracting party. So also, in an action by seamen to recover wages, the defendant is compellable to produce the ship's articles (5);

(1) Whitaker v. Izod, 2 Taunt. 115.
(2) See stat. 46 G. 3. c. 37. ante, p. 286.
(3) Gracewood v. ——, Barnes, 439.
(4) Blakey v. Porter, 1 Taunt. 386. King v. King, 4 Taunt. 666.
(5) Johnson v. Lewellyn, 6 Esp. N. P. C. 101. 1 Taunt. 386.

for, the contract for wages always remains in the possession of the master, and the statutes (which require a written agreement in the case of foreign voyages (1), and in the case of certain vessels employed in the coasting trade,) (2) expressly enact, that, where it becomes necessary to produce the contract in court, no obligation shall lie on the seamen to produce it, but on the master or owners of the ship; and that no seaman shall fail, in any suit or process for the recovery of wages, for want of its production.*

Where a person is sued on a written security, which he has given for the benefit of third persons, and he afterwards gets possession of the writing, the Court, on the application of the plaintiff, claiming an interest in the paper, though he has not signed it as a party, will compel the defendant to produce it, that it may be stamped previous to the trial. (3) The ground of the application is, that the applicant has an interest in the writing, the production of which is required; and he may be interested, though not, technically speaking, a party to the instrument. A person, who takes an estate by way of remainder, is not a party to the deed, by which his estate is created, but he has a strong interest in the deed, and is entitled to compel the production. (4) But the Court will not compel a person to produce a written instrument in his possession, that it may be stamped, on the application of one who is not a party to the instrument, nor interested in it. (5)

(1) St. 2 G. 2. c. 36. This statute does not apply to the case of a British seaman entering on board of a foreign ship in a British port, but is confined to voyages on board of British ships. Dickman v. Benson, 3 Campb. 290.

(2) St. 31. G. 3. c. 39.

(3) Bateman v. Phillips, 4 Taunt. 157. The writing was originally deposited in the hands of a third person for the benefit of the creditors of a bankrupt, who brought the action.

(4) Ib. 161.

(5) Osborne v. Taylor, cited 4 Taunt. 159. 162. Brown v. Rose, 6 Taunt. 283.

* The captain must produce the articles at the trial, though he has not received a notice for that purpose, if he would found any objection upon them, or resort to them in making his defence. The statute has introduced an exception to the general rule upon this subject. Bowman v. Manzelman, 2 Campb. 315.

And where an instrument is executed by two parties, each of whom keeps a part, the Court will not compel the one party to produce his part, in order to support an action against himself(1): if, for instance, a bond were executed, and afterwards lost by the obligee, he has no right to demand of the obligor to produce a copy in his possession. (2)

In an action between the plaintiff (a factor) and defendant (a grazier), the Court of King's Bench, on the motion of the defendant, made a rule for the plaintiff to shew cause, why he should not produce at the trial the several books, in which he entered the amount of beasts sold, and of money received on the defendant's account; and, no cause being shewn, the rule was made absolute. (3) The rule, which Lord Mansfield laid down in such cases, is said to be, that, wherever the defendant would be entitled to a discovery, he should have it in a court of law, without going into equity. (4) In causes on policies of insurance, it is now the common practice to obtain a judge's order, calling upon the assured to produce to the underwriters, upon affidavit, all papers in the possession of the former relative to the matters in issue; and if the one party is not content with such papers as are produced under the order, the other party will be obliged to make an affidavit, denying the relevancy of those which he withholds. (5) This practice has been adopted for its great convenience, as it saves the delay and expense of a bill in equity. But the practice in Chancery invariably is, that a party is entitled only to extracts of letters, if the other party will swear, that the passages extracted are the only parts relating to the subject-matter. (6)

Notice to a party to pro

In general, one party has not the means of compelling the

(1) Street v. Brown, 1 Marshall, 610. 6 Taunt. 302. S. C.
(2) Ib. 305.
(3) Goater v. Nunnely, 2 Str. 1130. Ward v. Apprice, 6 Mod. Rep. 264. contra.
(4) Barry v. Alexander, 25 G. 3. K.B. 1 Tidd. Pr. 618. See Smith v. D. of Northumberland, 1 Cox, Ch. C. 363. 365. Burton v. Neville, 2 Cox, 242. Campbell v. French, ib. 286.
(5) Clifford v. Taylor, 1 Taunt. 167. Goldschmidt v. Marryat, 1 Campb. 562.
(6) 1 Taunt. 167.

other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit. If such evidence is required, the rule, both in civil and in criminal cases (1), is to give the opposite party or his attorney (2) a regular notice to produce the original; not, that on proof of the notice he is compellable to give evidence against himself, or that, if he refuses to produce the papers required, such a circumstance is to be considered as conclusive against him (3), but the consequence will merely be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents.

duce papers in his possession.

Proof of the writing being in the party's possession.

Before this secondary evidence can be admitted, it ought to be clearly shewn, that the writing required is in the possession of the other party, and that a notice to produce it has been regularly served. The degree of evidence, which may be necessary to prove the fact of possession, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, it is scarcely possible to lay down any general rule upon the subject. Slight evidence may be sufficient, in many cases, to raise a presumption, that the writing is in the possession of a party, when it exclusively belongs to him, and regularly ought to be in his possession according to the course of business. In the case of Henry v. Leigh (4), the solicitor to a commission of bankrupt proved, that he had been employed by the defendant to solicit his certificate under the commission, and that, looking at the entry of charges, he had no doubt the certificate was allowed; it was therefore presumed, that the certificate came into the defendant's possession.

In certain cases, though the written instrument, which is

(1) The Attorney-General v. Le Merchant, 2 T. R. 201. n.

(2) 1 T. R. 203. n. Cates q. t. v. Winter, 3 T. R. 306. Service of the notice upon the wife of the party's attorney, late in the evening before the trial, has been held to be insufficient. Doe dem. Wartney v. Grey, 1 Starkie, 283.

(3) Cooper v. Gibbons, 3 Campb 363.

(4) 3 Campb. 502.

required, is not in the possession of the party to the suit, but in the possession of a third person, yet if there is a privity between such person and the party, a notice to the party may be sufficient. Thus, in the case of Baldney v. Ritchie (1), an action against the owner of a vessel for goods supplied for the use of of the vessel, Lord Ellenborough held, that a notice to the defendant to produce an order, which he had given to the captain, was sufficient to admit the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain; the evidence was held to be admissible, on account of the privity between the owner and the captain.

Calling for papers after notice.

If one party calls for books or writings in the possession of the other party, but, when they are produced, declines using them, the mere calling for them will not make them evidence for the adverse party. (2) It may, said Lord Kenyon, be matter of observation to the counsel on the other side, that the entries in the books were in favour of his client, but cannot entitle him to offer the books in evidence to the jury. If, however, the party, who has called for the books, inspects them, he thereby makes them evidence for the other party, although he has not used them himself in evidence. (3) Where books are refused, it is a suspicious circumstance, and open to much observation, but it will not be conclusive against the party. The regular time of calling for the production of papers and books, is not until the party, who requires them, has entered upon his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted (4); "The evidence," said Lord Ellenborough in the latter of the cases here cited, "cannot in strictness be anticipated, although it may be rigorous to insist upon the rule, and a close adherence to it may be productive of inconvenience."

(1) Starkie, N.P.C. 338.

(2) Sayer v. Kitchen, 1 Esp. N.P.C. 210.

(3) Wharam v. Routlege, 5 Esp. N.P.C. 235.

(4) Graham v. Dyster, 2 Starkie, N.P.C. 23. Sideways v. Dyson, 2 Starkie, 49.

Notice to produce, when dispensed with.

The rule, which requires, that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the cause, has been made with good reason; in order that the party may not be taken by surprise, in cases where it must be uncertain, whether such evidence will be brought forward at the trial by the adverse party. But this reason will not apply to cases, where from the nature of the proceedings the defendant has notice, that the plaintiff means to charge him with the possession of the instrument. It cannot here be necessary to give any other notice, than the action itself supplies. In an action of trover, therefore, for a bond, the plaintiff was allowed to give parol evidence of the contents, to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce the original. (1) And on a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be received, without any formal notice to the prisoner to produce the original. In Aickles' case (2), on an indictment for stealing a bill of exchange, all the judges held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been served with a subpœna duces tecum, but who did not appear. And in Layer's case (3), on an indictment for high treason, where it was proved that the prisoner had shewn a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. And in the case of De la Motte (4), on an indictment for a traitorous correspondence with the French government, where the question was, whether examined copies of the treasonable

(1) How v. Hall, 14 East, 274. Scott v. Jones, 4 Taunt. 865. Jolley v. Taylor, 1 Campb. 143. Butcher v. Jarratt, 3 Bos. & Bull. 143. 2 Merivale, 465.

(2) 1 Leach, Cr. C. 330.

(3) 6 St. Tr. 263. R. v. Moors, 6 East, 421. n.

(4) Cor. Buller J. and Heath J. O. B. 1781, 1 East P. C. 124. from MS. of Gould J. These copies were rejected on another ground, because the originals had not been traced to the prisoner's possession. See Howell's Coll. of St. Tr. vol. xxi. p. 737.

papers, which had been secretly opened at the post-office, and copied, and then forwarded to their place of destination, were admissible in evidence, the Court held, that they might be admitted, after proof that the originals were in the hand-writing of the prisoner.

Nor does the principle of the rule apply to the case, where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as, where a witness was called, on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that after the commencement of the action he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpœna. (1)

The counterpart of a deed is evidence against the person who signed it, and against his assignee, without giving notice to produce the original. Thus, in an action against the master of an apprentice, for not inserting in the indenture of apprenticeship the true consideration, an averment in the declaration, that A. B. by a certain indenture put himself apprentice to the defendant, may be proved by that part of the indenture which the defendant executed. (2) So, in an action of ejectment, upon a condition of re-entry for non-payment of rent, against the assignee of a lease, proof of the counterpart, executed by the original tenant, is sufficient proof of the assignee's holding on the same terms. (3)

Another case may here be mentioned, in which a majority of the judges in the Court of King's Bench were of opinion, that want of notice was not a sufficient objection against receiving parol evidence of the contents of a deed, because it appeared that the deed itself was in court in the possession of

(1) Leeds v. Cook, 4 Esp. N. P. C. 256.

(2) Burleigh v. Stibbs, 5 T. R. 465.

(3) Roe dem. West v. Davis, 7 East, 363. Mayor, &c. of Carlisle v. Blamire, 8 East, 487.

the opposite party. (1) At the trial of an ejectment, on the several demises of Haldane and Urry, title was deduced to Haldane under a will; but one of the plaintiff's witnesses said on cross-examination, that Haldane had conveyed all interest in the premises to Urry before the time of the demise in the declaration, and that the deed was in court. Upon this, it was insisted, that, as the plaintiff's witness proved the title out of Haldane, and as the deed of conveyance was in the court, the deed ought to be produced in evidence to show a title in Urry, the other lessor of the plaintiff. The counsel for the plaintiff, on the contrary, refused to produce the deed, insisting that the plaintiff ought to recover under one or the other of the lessors; for, if the one had parted with the title, the other had acquired it. But Mr. J. Aston, who tried the cause, being of opinion that the plaintiff ought to give further evidence to ascertain the title, under which he was to recover the term, nonsuited the plaintiff; and on a motion afterwards for setting aside this nonsuit, Lord Mansfield, after observing that in the action of ejectment the plaintiff could not recover but upon the strength of his own title, said, "It was plain the plaintiff had no title under Haldane, who had conveyed away all the interest in the premises to the other lessor, and that as to his claim of a title under Urry, the plaintiff had not proved any title; the jury could not have found for the plaintiff under the deed of conveyance to Urry, unless it were produced, and probably there was something in the deed which would have shewn that Urry had no title." Lord Mansfield laid the principal stress on the fact of the plaintiff's refusing to produce the conveyance from Haldane, which was admitted to be in court. "The want of notice," he said, "was no objection in this case, because they had the deed in court; and the refusal to produce it warranted the strongest presumption that neither of the lessors had any title." Mr. Justice Aston and Mr. Justice Willes agreed in opinion with Lord Mansfield. But Mr. Justice Yates differed from the rest of the Court. "He founded himself," he said, "upon the

(1) Doe on the several demises of Haldane and Urry v. Harvey, 4 Burr. 2484. See Doe dem. Wartney v. Grey, 1 Starkie, 283.

rules of evidence. The fact of the conveyance coming out on cross-examination could make no difference. The plaintiff's counsel were not obliged to produce the deed, for no man can be obliged to produce evidence against himself; the only consequence of a notice to produce would have been the admission of inferior evidence." Upon this case it may be observed, that the fact of Haldane's having conveyed away all his interest to Urry seems to have been assumed as satisfactorily proved; but from the opinion of Mr. Justice Yates, which seems to be the better opinion, it may be collected, that there was no legal proof of any conveyance of title out of Haldane, and that the answer of the witness, upon which the defendant's argument rested, was as inadmissible in evidence on the cross-examination, as it would have been on an examination in chief. The true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original; and it does not appear to be a sufficient answer to say, that the deed is in court; for, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference, which the production of the deed might have raised against him.

Proof of notice, by duplicate original.

A parol notice to produce writings may be proved by a third person who delivered the notice, or by one who heard it delivered; and a written notice to produce may be proved by a duplicate original. (1) A notice to quit in an action of ejectment (2), and a notice of the dishonour of a bill in an action upon the bill (3), may be proved in the same manner, by a duplicate original, without a notice to produce the other original. It may be objected, that the duplicate is not the best evidence of the contents of the notice delivered, as the supposed duplicate original may be inaccurate, and the contents may be proved to a certainty by the production of the notice itself; but, on the other hand, extreme inconvenience would arise

(1) Gotlieb v. Danvers, 1 Esp. N. P. C. 455. Surtees v. Hubbard, 4 Esp. N. P. C. 203.

(2) 2 Bos. & Pull. 41.

(3) Ackland v. Pearce, 2 Campb. 601. Roberts v. Bradshaw, 1 Starkie. 28. Langdon v. Hulls, 5 Esp. 157.

from a stricter medium of proof; for, if a duplicate notice to quit is not sufficient, no more is a duplicate of the notice to produce, and thus notices might be required in infinitum. The practice of allowing duplicates of this kind in evidence seems further to be sanctioned by this principle, that, as the original delivered is in the hands of the other party, it is in his power to contradict the duplicate original, by producing the other, if they vary. (1) When a notice may be either in writing or by parol, and a notice is given in both forms, it may be proved in either form. (2)

Upon the same principle, where a notice is given to a magistrate previous to the commencement of an action against him, or where a demand is made of a copy of a warrant preparatory to an action against a constable, if another paper is made out at the same time, precisely to the same effect as that delivered, both may be considered originals, and the paper so preserved may be received in evidence without a notice to produce the one delivered. (3) From analogy to these cases, in an action on an attorney's bill, though the plaintiff cannot produce parol evidence of the contents of the bill delivered, without giving notice to produce it (4), yet a copy, made out at the same time and proved to be correct, has been admitted to be good evidence. (5) A duplicate, which has been taken from an original letter at a single impression by means of a copying machine, is still only a copy; and therefore cannot be read, without a previous notice to the other party to produce the original. (6)

Proof of notice by the post.

Proof of having sent a notice or other paper by the post has been frequently considered, in mercantile transactions, to be sufficient proof of notice to the party, to whom it was directed; and this on a principle of general convenience.

(1) By Lord Eldon C. J. Jory v. Orchard, 2 Bos. & Pul. 41.
(2) Smith v. Young, 1 Campb. 440.
(3) 2 Bos. & Pull. 39.
(4) Shaw v. Markham, Peake, N. P. C. 164.
(5) Anderson v. May, 2 Bos. & Pull. 237. Philipson v. Chase, 2 Campb. 110. S. P.
(6) Nodin v. Murray, 3 Campb. 228.

A question has some times arisen, as to the requisite proof of the fact of sending by the post. In the case of Hagedorn v. Reid (1), where it became necessary to prove that a licence to trade had been sent by the plaintiff to A. B., it was proved to be the invariable course of the plaintiff's office, that the clerk, who copies a licence, sends it off by the post, and writes on the copy a memorandum of his having done so; a copy of the licence in question was produced from the plaintiff's letter-book, in the hand-writing of a deceased clerk, who had written a memorandum, stating that the original had been sent to A. B.; and a witness, acquainted with the plaintiff's mode of transacting business, swore, that he had no doubt the original was sent according to the statement in the memorandum; this evidence was held to be sufficient. In the case of Hetherington v. Kemp (2), where the question was, whether the defendant had received notice of the dishonour of a bill of exchange, it was proved, that, on the day after the bill became due, the plaintiff wrote a letter addressed to the defendant, stating that it had been dishonoured; that this letter was put down on a table, where, according to the usage of his counting house, letters for the post were always deposited, and that it was the business of a porter to carry them from thence to the post-office: but the porter was not called, and there was no evidence as to what had become of the letter, after it was put down upon the table. A notice to produce the letter had been served upon the defendant. It was contended for the plaintiff, that this was good primâ facie evidence, that the letter had been sent by the post. Lord Ellenborough held, that some evidence ought to be given, that the letter had been taken from the table in the counting-house, and put into the post-office. If the porter had been called, and if he had said, that, although he had no recollection of this particular letter, he invariably carried to the post-office all the letters found upon the table, this might have been sufficient; but it was not sufficient to give such general evidence of the course of business in the plaintiff's counting-house.

(1) 3 Campb. 379. (2) 4 Campb. 193

If a party in compliance with a notice should produce a deed, or other instrument, called for by the adverse party, the next question is, which of the parties ought to prove the execution, the one who calls for its production, or the other who produces. The general rule, laid down by Mr. Justice Buller, is, that "in civil actions, where a plaintiff wishes to give in evidence a deed in the defendant's custody, he gives the defendant notice to produce it; and the deed, when produced, must primâ facie be taken to be duly executed; because the plaintiff, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution." (1) Therefore, in a case of settlement, where the respondents had given notice to the appellants to produce an indenture of apprenticeship, by which the pauper was bound in the appellant parish, and which indenture was accordingly produced at the trial of the appeal, the Court of King's Bench held, that the court below ought not to have required the respondents to prove the execution, but that the indenture should have been admitted primâ facie as duly executed. (2)

Deed produced under notice, how proved.

In the next reported case on this subject, the case of Gordon and others v. Secretan (3), Lord Ellenborough C. J. said, that the case of the King v. Middlezoy had been much questioned at the time, and since over-ruled; and that the production of an instrument at the trial, in pursuance of a notice, would not supersede the necessity of proving it by one of the subscribing witnesses, as in ordinary cases. And Mr. Justice Lawrence added, that this point had been so ruled by Lord Kenyon in a subsequent case, where the adverse party, having notice to produce a written instrument, produced it accordingly at the trial, and Lord Kenyon held, that the party, who called for it, was bound to call one of the subscribing witnesses to prove the execution. In the case of Gordon and others v. Secretan, which was an action upon a policy of insurance on

(1) 2 T. R. 45.
(2) R. v. Inhabitants of Middlezoy, 2 T. R. 41. 5 T. R. 366.
(3) 8 East, 548. Wetherston v. Edgington, 2 Campb. 94. S. P. Johnson v. Lewellin, 6 Esp. N. P. C. 101.

shipped goods, the plaintiffs averred in their declaration, that they were interested in the subject-matter of the insurance, and the defendant, intending to dispute that fact at the trial, gave the plaintiffs notice to produce certain articles of agreement made between them and the captain of the ship, by which, as it was contended, the contrary would clearly appear: in pursuance of this notice, the plaintiffs at the trial produced the instrument attested by two witnesses, and insisted that the defendant should call one of them to prove the execution. The point was so ruled at nisi prius, and afterwards confirmed by the Court of King's Bench, From this case, therefore, it might be inferred, that, if a party to a suit in consequence of a notice produces an instrument executed between himself and others, yet that the other party, though a stranger to the instrument, ought to prove the execution, if he means to avail himself of it in evidence.

The rule, however, has been properly restricted by the late case of Pearce v. Hooper and others. (1) That was an action of trespass, and the question at the trial was, whether the place, in which the trespass was alleged, belonged to the plaintiff as part of a certain estate; the defendants gave notice to the plaintiff to produce a deed of conveyance, in which the estate had been conveyed to the plaintiff by a description limited to a number of acres, which, it was said, would necessarily exclude the place in question; the plaintiff produced the conveyance, and, on the authority of the cases before mentioned, it was ruled, that the defendant ought to prove the execution, which as he was not prepared to prove, the instrument could not be received in evidence. But on a motion afterwards for a new trial, the Court of Common Pleas were of opinion, that it was not necessary for the defendants in this case to call the attesting witness to prove the execution. The Court admitted, that the mere possession of an instrument by one party cannot, in general, absolve the other party, who calls for it, from the necessity of producing the

(1) 3 Taunt. 62.

attesting witness. "An instance to illustrate this," said the Chief Justice, "has been properly put in the case of a will, cited in the case of Gordon v. Secretan; for, supposing that an heir at law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will, there the heir claims not under the will, but against the will, and it would be hard, that the will should be taken as proved against him, because he produces it. But that is very different from the case, where a man is called upon to produce a deed, under which he holds an estate. The defendant (added the Chief Justice, with reference to the case then before the court,) has no interest in the fee-simple of the estate, if this deed does not convey it: if then he produces the deed, under which he claims, shall it not be taken to be a good deed, so far as relates to the execution, as against himself?" The other Judges concurred in opinion, and a new trial was granted.—The result therefore at present appears to be, that when a party to a suit, in pursuance of a notice, produces an instrument, to which he is a party, and under which he claims a beneficial estate, it will not be necessary, that the other party, a stranger to the instrument, should call an attesting witness to prove the execution; but that, in other cases, the execution ought to be regularly proved by the party, who offers the instrument as part of his evidence in the cause.

If, in compliance with a notice, the party produces the written instrument in his possession, he is entitled to have the whole read (1); and if a writing produced refers to others with such particularity as to make it necessary to inspect them, that the sense may be complete, or, referring to other writings, adopt them as part of its own meaning, he may insist on having these also read in evidence. (2)

If a party intend to use a deed or any other written instrument in evidence, he ought to produce the original, if he has

Secondary evidence, when admitted.

(1) See ante, p. 356.

(2) Johnson v. Gilson, 4 Esp. N. P. C. 21. Wheeler v. Atkins, 5 Esp. 246. Falconer v. Hanson, 1 Campb. 171.

it in his possession; but, if the instrument is in the possession of the other party, who refuses to produce it after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will then be admitted. If two parts of a deed, or more, have been executed, the loss or destruction of all the parts should be proved, before secondary evidence of the contents can be received (1); and the original deed ought to be proved to have been duly executed (2), unless proof of the execution would be dispensed with, if the original itself were produced, or unless the want of the original is occasioned by the default of the other party, in which case, the execution may reasonably be presumed against him. (3) So where an original note of hand is lost, a copy cannot be read in evidence, unless the note is proved to be genuine. (4)

Proof of loss of writing.

Proof by a witness, that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in the secondary evidence. This was determined by the Court of King's Bench in the case of Mr. Justice Johnson. (5) A similar point arose in the case of Kensington v. Inglis (6), in the course of which it became necessary to prove the loss of a licence; the witness said, it was his practice to destroy or put aside such licences amongst the waste papers of his office, as not being of any further use, and that he supposed he had disposed of the licence in question in the same manner as other licences for ships, whose voyages had been performed; but was not sure, that it was destroyed. The witness added, he had been afterwards applied to for this licence, and searched for it, but he did not recollect whether he had found it or not; though he did not think he had found it. Lord Ellenborough, adverting to the evidence, in delivering the judgment of the Court, said, "We are of opinion,

(1) Bull. N. P. 254. R. v. Castleton, 6 T. R. 236.

(2) R. v. Sir T. Culpepper, Skinner, 673. by Holt C. J.

(3) Doxon v. Haigh, 1 Esp. N. P. C. 410.

(4) By Lord Hardwicke C. J. Goodier v. Lake, 1 Atk. 246.

(5) R. v. Mr. Justice Johnson, 7 East, 66.

(6) 8 East, 278. 288.

that this evidence satisfies what the law requires in respect of search, and establishes with reasonable certainty the fact of the licence being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time on account of any importance being supposed to belong to it."

If the writing in question is traced into the possession of a particular individual, who is alive, he should be called to give some account of the instrument; if he is dead, an enquiry should be made of such persons as must be presumed to have it in their possession. Thus, in a case of settlement, where it was proved by witnesses, that an indenture of apprenticeship consisted of two parts, one of which had been destroyed, and the other had come to the hands of a person, who was living and had not been subpœnaed, but in answer to an application for the other part, he was proved to have said, that he could not find that part, and did not know where it was, the Court of King's Bench was of opinion, that this was not a sufficient ground for admitting parol evidence of the contents. (1)

In another case of settlement (2), where it appeared, that only one part of an indenture had been executed, that the pauper and master were both dead at the time of the trial, and that an enquiry for it had been made of the pauper shortly before his death, who said, that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, and an enquiry had also been made of the daughter and sole executrix of the master, who said, she knew nothing about it; under these circumstances the Court of King's Bench were of opinion, that a sufficient enquiry had been made to render parol evidence of the contents admissible; and the distinction taken between this case and the case of the King and Castleton was, that in that case there was evidence of

(1) R. v. Castleton, 6 T. R. 236. R. v. St. Sepulchre, 2 Bott. 353. Williams v. Younghusband, 1 Starkie, 139.

(2) R. v. Morton, 4 Maule & Selw. 48.

a fact which made a further search necessary, but that in this case the same information, which traced the instrument into the pauper's possession, plainly showed that any further search would have been nugatory. Here there was no proof, that the instrument ever existed in the possession of the pauper, unless his declaration could be taken as evidence; and if it could, he declared in the same breath, that it existed no longer. When therefore the pauper, by whose information alone the parties were acquainted with the fact of his having had the instrument in his possession, at the very same time declared, that it was destroyed, it became unnecessary to search among his papers.

One other case may be added, which has been lately decided.(1) On the hearing of an appeal against an order of removal, the principal question was, whether one person only, or more than one, had been appointed overseer in a particular year; the respondents, who, in order to vacate an indenture of apprenticeship, had to prove that only one overseer had been appointed in that year, had given notice to the appellants to produce all books and writings in their custody and power, relating to the appointments of overseers; the appellants, being called upon to produce under this notice, produced one parish book, which was the only one in existence, and the parish-officer, who produced it, proved that no appointments were kept by the parish: the respondents then proceeded to enquire of a witness, as to there having been, in the particular year, one or more overseers; but, on an objection being taken, the Court of Quarter Sessions held, and the Court of King's Bench afterwards confirmed their opinion, that, as the appointments had been in writing, parol evidence could not be admitted. "The question," said Lord Ellenborough, "is, whether the justices below have done wrong in rejecting the parol evidence. This is clear, that the parol evidence could not be admitted, until the case was ripe for the admission of secondary evidence; now it could not be considered as ripe for that purpose, until the respondent parish

(1) R. v. Stoke Golding, 1 Barn. Ald. 173.

had exhausted all the proper means of procuring the primary evidence. Have they done this? First, as to the appointment itself, they gave a notice to the parish; and, supposing the parish had the actual custody, that notice would have been sufficient, but this does not appear. Have they then the legal custody? Certainly not, for the legal custody is in the officer, who is the person most interested in the instrument, and who requires its production as a sanction for those acts, which he may be called upon to do under its authority. Now, here there has not been any notice to the overseer himself. I think, therefore," added Lord Ellenborough, "that, as in this case there has been an omission of the means of exhausting the primary evidence, recourse could not be had to that of a secondary nature."

What secondary evidence admissible.

The party, after accounting for the absence of the original, by proving its loss or destruction, or that it is in the possession of the other party, who has had notice to produce it, may read a counter-part; or, if there is no counter-part, an examined copy; or, if there should not be an examined copy, he may give parol evidence of the contents. (1)

A witness, in speaking to the contents of a lost writing, may assist his recollection by entries in his memorandum-book; but these entries are not in themselves admissible as evidence; so that, if the witness has not the memorandum-book at hand, ready to be produced, no objection can be taken on that account. In the case of Kensington v. Inglis, before cited (2), the witness, who proved the loss and contents of a licence, had kept a memorandum-book, in which he made entries of licences for his own information, and for the information of the governor of the country, who granted the licences; he gave it to the governor, but did not know where the book then was, or what the governor had done with it. As to the non-production of the memorandum-

(1) Villiers v. Villiers, 2 Atk. 71. Doxon v. Haigh, 1 Esp. N. P. C. 409. Waller v. Horsfall, 1 Campb. 501. Fisher v. Samuda, 1 Campb. 192. Liebman v. Pooley, 1 Starkie, 167.

(2) 8 East. 279. 289.

book, said Lord Ellenborough, that book, if it had existed, and been in the witness's hand ready to be produced, could not have been produced at the trial in proof of the fact of granting any particular licence; the only use, which it could be allowed to answer, being by way of memorandum, to refresh the memory of the person who made the entries, when he should be called as a witness.

Examined copies, and the parol evidence of witnesses, are the ordinary and regular proof of the contents of lost writings. But when a written paper has been traced into the possession of one of the parties to the suit, who does not produce it after receiving a notice, something less than an examined copy may reasonably be admitted as sufficient, at least to oblige the party to give better evidence by producing the paper itself, if he finds the secondary evidence incorrect. In a late case, where it appeared that the defendant had acknowledged the receipt of a letter of a particular date, which was not produced at the trial when required, it was ruled, that an entry in a letter-book, (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality,) was admissible evidence of the contents of the letter in question. (1) "The rules of evidence," said Lord Ellenborough, "must expand according to the exigencies of society: this entry is reasonable evidence to prove the contents of the letter of the particular date, which the defendant acknowledges he received, and which he does not produce upon a notice for that purpose: we know, it is the habit of merchants to keep such a book, and a witness has sworn, that the book in question was kept with great punctuality: if the entry in the clerk's hand-writing were not admitted, there would be no way, in which the most careful merchant could prove the contents of a letter after the death of his entering clerk: I will therefore allow," added Lord Ellenborough, "the entry to be read as primâ facie evidence, and the defendant may rebut it by producing the original."

(1) Pritt v. Fairclough, 3 Campb. 305. by Lord Ellenborough.

The case of Bullen v. Michel (1), which has been lately determined, affords an example respecting the admissibility of secondary evidence of ancient documents. In that case, on an issue to try whether a particular farm in the parish of S. was discharged of tithes on payment of a modus, the Court of Exchequer determined, that an old ledger or chartulary of the abbey of Glastonbury was admissible as secondary evidence of the endowment of the vicarage. Two questions arose, one, with respect to the custody, from which this document was produced, which will be afterwards mentioned; the other, (supposing it to have been sufficiently authenticated as to the propriety of its custody,) whether it could be admitted in evidence between the parties to the issue, the vicar and the occupiers of the farm. With respect to this it appeared, that the chartulary contained an account of matters of a miscellaneous description; among other things, it contained entries which appeared to be transcripts of contemporaneous documents considered as authentic; and these transcripts purported to give an account of the licence of appropriation of the parish, and likewise an account of the several matters of endowment. The original endowment not being found in the places, where search had been made for it as its natural places of deposit, the Court held, that the chartulary, having been found in the custody of the Marquis of Bath, (and which must, therefore, be considered as having come from the custody of the rector, for the abbot was formerly the rector,) was admissible evidence. (2) The plaintiff appealed from this judgment to the House of Lords, who affirmed the judgment of the Court of Exchequer. Lord Redesdale, in giving his opinion on that occasion, stated (3), that the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, inquisitions on the writ of ad quod damnum, and a variety of similar evidence, from which the jury may draw their inference. The *only question then* is, whether the entries in this book are evidence of these two

(1) 2 Price, 399. Judgment affirmed in the House of Lords, 4 Dow. 298.

(2) Wood B. differed from the rest of the Court on this point.

(3) 4 Dow. 324. 2 Price, 399.

instruments. If the originals could be produced, these entries could not be evidence. But search has been made, and the originals cannot be found; and if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall constantly do injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances: and secondary evidence is then admitted, to raise presumption or inference, where no direct evidence can be had. This then is the next best evidence; and perhaps evidence still more inferior might have been admitted, if this could not have been produced. This however appears to be the best after the originals; for what is it? These two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey, that the instruments should be preserved; and for the same reason it might be presumed, that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept.

Profert dispensed with, on loss of deed.

The loss of a deed by time and accident, or by any other casualty, is a sufficient reason for dispensing with a profert in pleading, when otherwise a profert might be necessary (1); or it may be pleaded, that the deed is in the hands of the opposite party, or destroyed by him. (2) But if the plaintiff, instead of declaring upon the deed, as lost or destroyed, inadvertently pleads with a profert, and the defendant pleads non est factum, the plaintiff will not be allowed to prove the loss at the trial, and must be nonsuited. (3) In such a case, the plaintiff should move to put off the trial, and amend the pleadings, stating the circumstances to excuse the profert. (4) But it would be too late to make such a motion at nisi prius. (5)

(1) Read v. Brookman, 3 T. R. 151. Bolton v. Bp. of Carlisle, 2 H. Black, 259.

(2) Totty v. Nesbitt, 3 T. R. 153. n. (c).

(3) Smith and others v. Woodward, 4 East, 585.

(4) Ibid.

(5) Paine v. Bustin, 1 Starkie, 74

When a deed is produced in evidence, the next step is to prove it duly executed. In a few cases, however, proof of execution will not be necessary.

Proof of execution.

First, if the deed is thirty years old, it may be admitted in evidence without any proof of its execution; and the same rule applies generally to deeds concerning lands, to bonds (1), receipts (2), and all ancient writings. Some account, however, says Mr. Justice Buller, ought to be given of the place where the deed was found (3); and in another book it is said, that "ancient writings, which are proved to have been found among deeds of evidences of land, may be given in evidence, although the execution cannot be proved; for it is hard to prove ancient things, and the finding them in such a place is a presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty." (4)

Exceptions. 1. Deeds 30 years old.

If there is any blemish in the deed by rasure or interlineation, the deed ought to be proved though above thirty years old (5), and the blemish satisfactorily explained. In such a case, the jury would have to try, whether the rasure or interlineation was before or after the delivery of the deed; for, if the rasure was before that time, the deed is still valid and binding: it is only after the delivery, that a rasure or interlineation can affect a deed, and even then they are in some cases immaterial. Now, to ascertain the time of delivery, the first and best evidence to be resorted to is the testimony of a subscribing witness, if any can be produced; or, if there is no subscribing witness, other persons may be called, who were present when the deed was delivered; or, if no person was present, the time of delivery will be reckoned from the

(1) Governor of Chelsea Waterworks v. Cowper, 1 Esp. N. P. C. 275.

(2) Fry v. Wood, 1 Selw. N. P. 492. Manby v. Curtis, 1 Price, 232. Bertie v. Beaumont, 2 Price, 308. Bullen v. Michel, 2 Price, 399. 4 Dow. 297.

(3) Bull. N. P. 255.

(4) Vin. Ab. tit. Evidence, (A. b. 5), cited 7 East, 291. Forbes v. Wale, 1 Black. 532., cited by Lord Kenyon, 1 Esp. N. P. C. 279.

(5) Gilb. Ev. 89. Bull. N. P. 255.

date of the deed; and the fact, of the rasure being after the delivery, may be proved either by a subscribing witness, or by any other person, who saw the rasure made.

The rule, that deeds of thirty years' standing prove themselves, is so well established, that even if a subscribing witness were alive, and in a state to be produced, it has been thought unnecessary to call him for proving the execution. Lord Kenyon is reported to have said (1), that he remembered a case before Mr. Justice Yates, in which a deed of that age being produced in evidence, it appeared that the subscribing witness was then actually in court, but the Judge declared he would not break in upon a rule of evidence so well established, by requiring the subscribing witness to be called, and admitted the deed without further proof. But in the case of Rees v. Mansell (2), Mr. Baron Perrot held that, although a deed may be read in evidence on account of its antiquity, yet, if on the other side it is shewn that one of the witnesses is alive, he must be produced, or the deed must be rejected; and he cited a case, where a deed was produced in the King's Bench, and it appeared that Sir Joseph Jekyll was the subscribing witness, upon which the Court said, they knew he was alive, and that if he did not come to prove it, the plaintiff must be nonsuited. It was then mentioned to have been ruled by Mr. Justice Yates, that, for the sake of practice, the witness should not be allowed to prove an old deed, even if he attended for that purpose; but Mr. B. Perrott retained his opinion: "An old deed (he said) is admitted only on a presumption, that the witnesses are dead, but when the contrary is made to appear, they must be called." If, indeed, the rule is founded on the presumption of the attesting witness's death, then it seems to follow, that, where this presumption is contradicted by the fact of his being still alive, the execution of the deed ought to be regularly proved, as in ordinary cases. But if courts of law have adopted the rule, not on the presumption of a fact, (which would be for

(1) March v. Collnett, 2 Esp. N. P. C. 665.
(2) 1 Selw. N. P. 492.

the consideration of the jury rather than of the court,) but as a general maxim of law, on account of the great difficulty of proving execution after an interval of many years, and have therefore fixed a limit, beyond which the proof of execution will not be required, there appears to be no inconsistency in acting generally upon this principle, though in a particular case the subscribing witness may be proved to be alive, at the same time leaving it to the opposite side to dispute the regularity of the execution by calling him or any other witness.

Where the title-deeds of an estate are produced, in an action for the non-performance of an agreement of purchase, as proof of a good title in the plaintiff the vendor, it will not be necessary to prove their execution by calling the subscribing witnesses. This point was decided, in the case of Thomson v. Miles. (1) Lord Kenyon there said, he would never allow, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, nor expected in making out a title in any case of purchase, more particularly where possession has accompanied the deeds; and they were therefore admitted without proof of the execution. In a late case before Lord C. J. Mansfield (2), where, in an action of assumpsit upon an agreement to purchase a leasehold house, it appeared that the plaintiff the vendor was the third or fourth assignee of the term, and it was contended that he need only prove the execution of the last assignment, it was ruled otherwise; and he was compelled to prove the lease and all the mesne assignments. However, Lord Kenyon's decision was not adverted to; and as that is understood to coincide with the practice in these cases, it can scarcely be considered as over-ruled. (3)

Secondly, Deeds enrolled have been admitted without proof 2. Deeds enrolled.

(1) 1 Esp. N. P. C. 184.

(2) Crosby v. Percy, 1 Campb. 303.

(3) See Mr. Sugden's Treatise on the Law of Vendor and Purchaser, p. 195.

of execution. (1) On this subject, Ch. B. Gilbert makes the following distinctions: "Where a deed needs enrolment," (as deeds of bargain and sale, by statute 27 Hen. VIII. c. 16.) "there the enrolment is the sign of the lawful execution of such deed, and the officer, appointed to authenticate such deeds by enrolment, is also empowered to take care of the fairness and legality of such deeds, and therefore a copy of such enrolment must be sufficient; for when the law has appointed them to be made public acts, the copy of such public acts shall be a sufficient attestation. (2) But where a deed needs no enrolment, there, though it be enrolled, the inspeximus of such enrolment is not evidence, because, since the officer has no authority to enroll them, such enrolment cannot make them public acts, and consequently cannot entitle the copy of them to be given in evidence; for then, if the deed were doubtful, it were but to enroll it, and bring the copy or inspeximus in evidence, and thereby avoid producing a deed that was any way suspicious." (3)

Mr. Justice Buller, after citing the rule from Chief Baron Gilbert, (that deeds of bargain and sale, enrolled and requiring enrolment, may be given in evidence without proof of the execution,) observes (4), that "the law may well be doubted, "notwithstanding that such deeds of bargain and sale enrolled "have frequently in trials at nisi prius been given in evidence "without being proved. In support of this practice," he adds, "the case of Smartle v. Williams (5) is much relied on; "but that case is wrong reported, for it appears from the re- "port in Levinz (6), that the acknowledgment was by the "bargainor, and so is stated in Salkeld's manuscript; besides "it appears from both the books, that it was only a term that "passed, and consequently it was not an enrolment within "the statute." Mr. Justice Buller then cites a case from

(1) Com. Dig. tit. Evidence, (B 2.), citing 1 Salk. 281.

(2) Gilb. Ev. 86. Baikie v. Chandless, 3 Campb. 21. Garrick v. Williams, 3 Taunt. 544. Taylor v. Jones, 1 Ld. Raym. 746. 1 Keb. 117. 1 Salk. 280.

(3) Gilb. Ev. 86. 1 Keb. 117.

(4) Bull. N. P. 256.

(5) 1 Salk. 280.

(6) 3 Lev. 387. S. C.

Styles's Reports (1), where Glyn C. J. is reported to have said, that " if divers persons seal a deed, and but one of them acknowledge the deed, and the deed is thereupon enrolled, this is a good enrolment, and may be given in evidence at a trial, as a deed enrolled." " But it would be of very mischievous " consequence," observes Mr. Just. Buller, " to say, there- " fore, that a deed, enrolled upon the acknowledgment of a " bare trustee, might be given in evidence against the real " owner of the land, without proving it executed by him. " However, that has been the general opinion, and it seems " fortified in some degree by statute 10 Ann. c. 18. On the " other hand, it seems as absurd to say, that a release which " has been enrolled upon the acknowledgment of the releasor " shall not be admitted in evidence against him, without being " proved to be executed, because such release does not need " enrolment: and in fact such deeds have often been ad- " mitted: and that was the case of Smartle v. Williams; the " deed there did not need enrolment, yet being enrolled on " the acknowledgment of the bargainor, it was read against " him without being proved."

In the case of Smartle v. Williams, an examined copy of the enrolment of a deed of bargain and sale, by which a term of years was assigned, was offered in evidence without any proof of the bargainor's sealing and delivery. It was objected, that the copy of the deed enrolled was not evidence, because the interest assigned, being only a term, passed immediately, and the enrolment afterwards is no more than an enrolment of an obligation: but the court over-ruled this objection, and held, that " the acknowledgment of the deed by the lessor before the master in Chancery is good evidence against himself, and against all who claim under him." (2) So, in the case of Lady Holcroft v. Smith (3), a distinction was made between deeds of bargain and sale, (enrolled in pursuance of the statute of Henry VIII.) and other deeds enrolled, and it was held, that a copy of a deed, enrolled for safe custody, would

(1) Thurle v. Madison, Styl. 462.
(2) 3 Lev. 387.
(3) 2 Freeman, 259.

not be evidence otherwise than against the party, who sealed it, and all claiming under him. It does not appear from any of the authorities cited by the Chief Baron Gilbert, (excepting the case of Smartle v. Williams,) against what party the copy of the enrolment was offered in evidence. If the enrolment had been on the acknowledgment of the bargainor, and offered as evidence against him, there cannot be a doubt of its being admissible.

With regard to a copy of the enrolment of a deed of bargain and sale, indented and enrolled in pursuance of the statute of Henry VIII., it is enacted by statute 10 Ann. c. 18. s. 3. (1) "(for supplying a failure in pleading or deriving title to lands, &c. conveyed by such deeds of bargain and sale, where the original indentures are wanting,) that, where in pleading any such indenture shall be pleaded with a profert, the party so pleading may shew forth and produce a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer having the custody of the enrolment, and proved upon oath to be a true copy, shall be of the same force and effect, as the indenture of bargain and sale would be, if produced." Before this statute, an enrolment of the deed could not have been pleaded; and though a deed had been exemplified under the great seal, yet it was necessary, at common law, to shew forth the deed itself under seal, and not the exemplification. (2) So, by the common law, a constat or inspeximus of the king's letters patent could not have been shewn forth in court, but the letters patent themselves: but by statute 3 & 4 Ed. VI. c. 4., explained by stat. 13 Eliz. c. 6., "patentees, and persons claiming under them, may make title in pleading by shewing forth an exemplification of the enrolment of the letters patent, as if the letters patent themselves were pleaded and shewn forth;" and now they are to be given in evidence in the same manner, as if they were pleaded. (3)

(1) See also stat. 8 G. 2. c. 6. s. 22. concerning deeds of bargain and sale of lands, in the North Riding of Yorkshire

(2) Co. Lit. 225. *b.*

(3) Olive v. Gwyn, Hardr. 119

The rule concerning copies of enrolments appears then to be, that an examined copy of the enrolment of a bargain and sale of freehold in lands, &c. is as good evidence as the original itself (1); but that a copy of the enrolment is not evidence of a bargain and sale of a chattel interest, or of the contents of any other deed enrolled for safe custody, except as against the party acknowledging the deed; and that against such party, and against all claiming under him, a copy of the enrolment of any deed is admissible in evidence.

The enrolment of a bargain and sale under the statute of Henry the Eighth is a record; the date of the enrolment is a material part of the fact of the record, and evidence or an averment of a different date is not admissible. (2)

3. Recital in a deed.

Thirdly, The recital of a deed in another deed is evidence against the party, who executed the reciting deed, or against any person claiming under him; and it will not be necessary, in such a case, to prove the execution of the recited deed; but proof of the execution of that, which recites the other, will be sufficient; for, the party, and those claiming under him, are estopped by the recital. (3) Thus, the recital of a lease in a deed of release is good evidence of such lease against the releasor, and those who claim under him. (4) So where a party by his deed covenanted to lay out a sum of money in an annuity, and recited in the deed, that he had given a bond for the payment of the money, the recital was held to be sufficient evidence of the bond; for it was a confession by the obligor himself, and stronger than a verbal confession, being under his hand and seal. (5) But a recital cannot operate as an estoppel against third persons who are neither parties nor privies to the reciting deed, and will not be evidence of the contents of the recited deed. (6) If the recital can be proved a correct copy,

(1) See 14 East, 231. and Hobhouse v. Hamilton, 1 Schoal. & Lefr. 207.

(2) The King in aid of Reed v. Hopper, 3 Price, 495. 511.

(3) Com. Dig. tit. Evidence, (B 5.) Fitzgerald v. Eustace, Gilb. Ev. 89.

(4) Ford v. Grey, 1 Salk. 285.

(5) Marchioness of Annandale v. Harris, 2 P. Wms. 432. by Ld. Chan. King. See also Shelley v. Wright, Willes, 11. and Com. Dig. tit. Estoppel, (A 2.)

(6) 1 Salk. 285.

it is scarcely necessary to observe, that it will be admissible like any other examined copy, where secondary evidence of a deed can be admitted.

4. Deed produced by rule of court.

Lastly, A deed may be given in evidence, under a rule of Court, without proof of execution; for the consent is conclusive, and the jury are to try only such facts as are in issue between the parties. (1)

Custody of old documents.

The character and authenticity of old writings depend in a great degree on the nature of the place or custody, in which they have been kept. This is the case with terriers, ecclesiastical surveys, court rolls, and other muniments of manors,—which ought to be produced each from its proper depository; and if they have been regularly preserved, it will not be necessary, after a considerable lapse of time, to prove them genuine. For the same reason, old grants to abbeys have been rejected as evidence of private right, because the possession of them did not appear to be connected with any persons, who had an interest in the estate. In the case of Bullen v. Michel, before stated (2), one of the questions, on the admissibility of the chartulary, related to the custody, from which that old document was produced. It appeared, that the chartulary was brought from the muniment-room of the Marquis of Bath, who, although not the owner of this particular farm, nor of any property in the parish of S., was the owner of other estates formerly belonging to the abbey, and concerning which estates entries were to be found in the same document; and the character of the hand-writing in the chartulary was proved to be of the reigns of the three first Edwards. "The question is," said the Lord Chief Baron Gibbs, in delivering the judgment of the Court, "whether this book appeared, from the facts attending it, to have belonged to the abbey of Glastonbury. We should recollect, that such a book as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dis-

(1) 1 Siderf. 269. Gilb. Ev. 91.
(2) See ante, p. 491. And see the cases of Michell v. Rabbets, and Swinnerton v. Marquis of Stafford, ante, p. 418.

solved, those estates went to the Crown, and the Crown afterwards granted them to different persons; the book, when the abbey was dissolved, would go to the officers of the Crown, and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go only to one of those grantees; and the only possible way of connecting it with the abbey is, by shewing a connection between the possessor and the Crown, and by raising a probability, that the Crown may have handed over the book to the present possessor." Now, such a connection was shewn in the present case; for it appeared, that the present owner of the book is also the owner of certain lands, which formerly belonged to the abbey, and on the dissolution of the abbey passed to the Crown, and from the Crown to the present possessor; and the probability is, that the book attended the lands in their passage from the Crown. On this ground, therefore, the Court were of opinion, that the custody was so accounted for as to render the book admissible in evidence.

The case of Earl v. Lewis (1) is another instance on this subject. There it was proved, on the trial of an issue respecting the boundaries of two adjoining parishes, that the old papers, offered in evidence on the part of the plaintiff (the rector of one of the parishes), had come into the possession of the son of the former rector, upon his father's death, and that the son delivered them over, as papers belonging to the parish, into the hands of the witness, who produced them in court, in the same state in which he had received them; and this was held to be sufficient evidence of the authenticity of the papers. So in the case of Jones v. Waller (2), on a bill for tithes, a book purporting to be the book of a collector of tithes, something more than seventy years old, being in the hands of the successor of that collector, was for that reason considered authentic.

In the case of Manby v. Curtis (3), a paper purporting to

(1) 4 Esp. N. P. C. 1. before Heath J.

(2) 3 Gwill. 847. The evidence is said to have been received without proof of the collector's handwriting.

(3) 1 Price, 225. Mr. Baron Wood dissenting.

be a receipt fifty years old, was produced as matter of evidence, to shew that a man of the name of Curtas had fifty years before paid to a man of the name of Smith a certain sum in lieu of tithes, and, in support of the authenticity of this paper, it was proved to have been delivered to the witness by the defendant; but it did not appear, where the defendant got the paper, nor did it appear whether Smith was dead, or even who he was; the Court of Exchequer therefore rejected the evidence, on the ground that the paper had not been authenticated. And in the case of Randolph v. Gordon (1), where a book, purporting to be the book of a former rector, was produced by the defendant's attorney who received it from the defendant, and the defendant was the grandson of the former rector; but it did not appear, whether he had found the book among his grandfather's papers, or how it came into his possession; the Lord Chief Baron held, that the book was not admissible.

In the case of Bertie v. Beaumont (2) the question was, whether a paper, which on the face of it contained evidence of money-payments in lieu of the tithes enumerated in it, was admissible to shew that a Dr. Eyre, who was clearly at the time rector, and had been so for many years preceding, and had received customary payments, (there being also negative evidence, that no payments of tithes in kind had been ever made,) had given such receipt, and thereby acknowledged such payments. This paper was produced by the defendant's solicitor, who stated, that he received it from the defendant, for the purpose of preparing his defence. It was not given to the defendant, but to another person of the same name, and who of course occupied lands in the parish, for none but an occupier could have acquired such a receipt. The Lord Chief Baron Thompson said, "that person being of the same name with the present defendant, there is a reasonable inference, that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient." It was objected

(1) 5 Price, 312 (2) 2 Price, 307

also, that the hand-writing of the paper had not been proved, "but," said the Chief Baron, "I do not think that any such proof was necessary to establish a document of this sort, at such a distance of time, any more than it would have been necessary to prove a deed of the same date."

The rule respecting the proof of the custody in which documents have been kept, is confined to ancient documents, whose authenticity depends, in some degree, upon their custody, and which must be shewn to be connected with the party who produces them. In common cases, where the written instrument itself purports to belong to the party, who produces it in evidence, no proof can be requisite as to the place in which it has been kept. On a question of settlement, where the respondents produced a certificate, more than thirty years old, purporting to be granted to their parish by the appellant parish, the mere production of it was held to be sufficient, and the respondents were not obliged to shew, that the certificate had been kept in the parish chest. (1) It would be sufficient, if the certificate were to be produced by a rated inhabitant of the parish. (2) So in an action for a false return to a mandamus, a corporator may produce the muniments of the corporation. (3) It has been before mentioned, that if a witness is called merely to produce an instrument, he need not be sworn for that purpose. (4)

Proof of execution by subscribing witness.

The general rule is, that a deed cannot be given in evidence without proof of its execution. The execution of every attested instrument, whether under seal or not, ought to be proved by a subscribing witness, if he can be produced, and is capable of being examined. The subscribing witness alone is competent to prove the execution, because he may be able to state the time of the execution and some circumstances of the transaction, which may be material and unknown to other persons. On an indictment therefore against an apprentice for enlisting

(1) R. v. Ryton, 5 T. R. 259.

(2) R. v. Netherthong, 2 Maule & Selw. 337. This was before the late act of parliament, which made rated inhabitants competent witnesses on the trial of an appeal.

(3) 2 Maule & Selw. 338.

(4) See ante, p. 285.

himself in the army, all the Judges held, that the indenture of apprenticeship could not be proved by the master, but that it was necessary to call one of the subscribing witnesses. (1)

This rule is so strictly observed, that an acknowledgment of the obligor himself, admitting that he executed a bond (2), and even an admission by the defendant in an answer to a bill filed against him for a discovery (3), will not dispense with the testimony of the subscribing witness; for though the party may acknowledge the bond, yet he may not know every circumstance attending the execution; "a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." (4) The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself who made it (5), or against a third person (6); or whether the deed is an existing instrument, or cancelled (7); or whether it is the foundation of the action, or comes in collaterally as part of the evidence in the cause. (8)

The same rule applies equally to all written instruments, which are attested. Attested notices to quit (9), attested warrants to distrain (10), attested bills of exchange or promissory notes, are to be proved by the attesting witness: in the case of a notice to quit, the circumstance, that the party, upon whom the notice was served, read the notice and made no objection to it, cannot vary the rule. (11) In all these cases, the attesting

(1) R. v. Jones, East, P. C. 822. 1 Leach, Cr. C. 208. S. C. R. v. Harringworth, 4 Maule & Selw. 350.

(2) Abbot v. Plumbe, 1 Dougl. 216. cited by Lawrence J. 7 T. R. 267. and 2 East. 187. In an action of covenant, payment of money into court, on one of the breaches, is an admission by the defendant, which dispenses with proof of the execution of the deed, although one of the pleas pleaded is the plea of *non est factum*. Randall v. Lynch, 2 Campb. 357.

(3) Call v. Dunning, 4 East, 53. See Bowles and another, Assignees of Jones, v. Langworthy, 5 T. R. 366. and as to the case of R. v. Middlezoy, on the authority of which that case was determined, see ante, p. 483.

(4) Le Blanc J. 4 East, 53.

(5) 4 East, 53.

(6) 1 Dougl. 216.

(7) Breton v. Cope, Peake, N. P. C. 30.

(8) Manners q. t. v. Postan, 4 Esp. N. P. C. 239.

(9) Doe dem. Sykes v. Durnford, 2 Maule & Selw. 62.

(10) Higgs v. Dixon, 2 Starkie, 180.

(11) 2 Maule & Selw. 62.

witness ought to be called to prove the execution, if he can be produced. If, indeed, the attorney of a party to the suit admits the execution of the instrument, or agrees that the other party should act upon the instrument, as if the witness himself had been produced, or if he admits merely the hand-writing of the subscribing witness, that would dispense with his testimony. (1)

The subscribing witness is to prove the delivery of the deedt or, if the writing is not under seal, the hand-writing of the party. If the person, who signed the instrument, signed it for another under a power of attorney, the power ought regularly to be produced and proved. (2) It is not absolutely necessary that the witness should see the party sign or seal; if he sees him deliver it already signed and sealed, or merely sealed, as his own deed, it will be sufficient. Nor will it be necessary for him to prove, that blanks, which had been left in the instrument for the purpose of being filled up, were filled up at the time of the execution. (3) Some evidence of the identity of the party, who executed, is obviously necessary. (4)

Signing is not an essential part of a deed at common law; but it has been required in some cases by act of parliament, particularly by the statute of frauds, which expressly directs a signing in all grants of a freehold estate in lands, and in some other species of deeds; in which, therefore signing is as necessary as sealing. Signing.

Sealing is essential to a deed, but it is not material with what seal it is sealed. Any number of parties may use the same seal. (5) If there be twenty to seal one deed, (says the author of the Touchstone,) and they all seal upon one piece of wax and with one seal, yet if they make distinct and several prints, this is a sufficient sealing, and the deed is Sealing.

(1) Laing v. Raine, 2 Bos. & Pull. 85. Goldie v. Shuttleworth, 1 Campb. 70. Young v. Wright, 1 Campb. 140. Milward v. Temple, 1 Campb. 375.

(2) Johnson v. Mason, 304. 1 Esp. N. P. C. 89. 116.

(3) England v. Roper, 1 Starkie, 304.

(4) Bull. N. P. 171. Middleton v. Sandford, 4 Campb. 34. Nelson v. Whittal, 1 Barn. Ald. 20. Parkins v. Hawkshaw, 2 Starkie. 239.

(5) Perkins, ch. 2. s. 134. Sheph. Touch. 55. Com. Dig. tit. Fait, (A 2.)

good. (1) Or one may seal for the rest with their consent, and the deed will be as binding, as if every one had put his several seal. (2) Thus, where one of two defendants, in the presence of the other and by his authority, executed a bill of sale for them both, the two defendants being partners in the transaction, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, the Court of King's Bench held, that no particular mode of delivery was necessary; and that it was sufficient if a party executing a deed, treated it as his own. The report adds, that the Court relied principally on the circumstance, that the deed had been executed by one defendant for himself and the other, in the presence of the other. (3) If a bond, executed abroad, is declared upon in the usual form, as a deed made and sealed by the defendant, and the instrument on being produced appears not to have a seal, but instead of it a pen-mark of a particular kind, evidence is admissible to shew, that it is the custom of the country to execute bonds in this manner. (4)

Delivery of deed.

With regard to the delivery of a deed, no particular form or ceremony is necessary: it will be sufficient, if a party testifies his intention in any manner, whether by action or by word, to deliver or put it into the possession of the other party; as, if a party throw the deed upon a table, with the intent that it may be taken by the other, who accordingly takes it: or, if a stranger deliver it with the assent of the party to the deed. (5) If the deed is made by a corporation, actual delivery is not required; and fixing the common seal, that is the corporate seal, or any other used for the occasion (6), is tantamount to a delivery; but if the corporate body has given a letter of attorney to deliver, the deed is not theirs till delivery. (7)

(1) Touchst. ch. 4. p. 55. Fitzh. tit. Feoffment, pl. 105.
(2) 4 T. R. 314.
(3) Ball v. Dunsterville and another, 4 T. R. 313.
(4) Adam v. Kerr, 1 Bos. & Pull. 360.
(5) Com. Dig. tit. Evidence, (A 3.) Co. Lit. 36. a. [Note 223.]
(6) Perkins, c. 2. s. 132.
(7) Co. Lit. 36. a. [Note 222.]

It has been before mentioned, that proof of delivery, without any proof of signing or sealing, will be sufficient evidence of execution; for the party, by delivering a deed purporting to be his own, adopts the seal and the signature. But, under particular circumstances, less evidence has been admitted to prove the execution. In a case where it appeared that the defendant, a few minutes after having executed the deed, brought it to the witness in an adjoining room, and desired him to attest it; another attesting witness was still in the room, where the deed had been executed; and it was further proved, that the witness was acquainted with the defendant's hand-writing, and that the defendant knew of his being acquainted with it, and that the defendant had acknowledged the instrument; but there was no proof of the act of delivery, and no reason was shewn, why the other attesting witness could not be called to prove the delivery; in this case the Court of Common Pleas was of opinion, that the whole might be considered as one transaction, and that there was sufficient proof of the execution. (1)

Execution of powers.

The distinction between executions of deeds at common law, and executions under powers, is fully established. It is a well-known rule, that all the formalities and circumstances, prescribed by a power, are to be strictly observed. If a particular number of attesting witnesses is required, there must be that number. If they are to attest in a particular form, that form must be followed, and they must attest every thing, that is necessary for the execution of the power. The following are the latest cases that have been determined upon this subject. (2)

In the case of Wright v. Wakeford (3), where a power was created to be executed by trustees, with the consent of the cestui que trusts testified by *writing under their hands and seals, attested by two or more credible witnesses*, but the attestation expressed only, that the deed had been

(1) Parke v Mears, 2 Bos & Pull. 217. Powel v. Blackett, 1 Esp N. P C. 96. Grellier v. Neale, Peake, N. P. C. 146

(2) The subject is fully considered in Sugden's Treatise on Powers.

(3) 4 Taunt. 214.; Mansfield C. J. dissenting. 7 Taunt. 361. 17 Ves. 454. S. C.

sealed and delivered by the cestui que trusts and the other parties in presence of the subscribing witnesses, the majority of the Court of Common Pleas determined, that the power had not been duly executed; for the question is to be determined by the true construction of the terms of the attestation, and by that alone; and the word "sealed," according to its true acceptation and ordinary sense, cannot be considered as implying, that the parties who put their seals to the instrument, put also their hands to it, or signed it in the presence of the witnesses. It was further determined in this case (1), that a subsequent attestation, indorsed upon the instrument after the death of one of the cestui que trusts, and expressing that the parties had also signed in the presence of the subscribing witnesses, would not cure the original defect; on the ground, that the attestation to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing, such being the usual and common way of attesting the execution of all instruments requiring attestation.

In the late case also of Doe on the demise of Mansfield v. Peach (2), * where the power was directed to be executed

(1) See also 17 Ves. 457.

(2) 2 Maule & Selw. 576. Wright v. Barlow, 3 Maule & Selw. 512. S.P.

* In consequence of the decisions in the cases of Wright v. Wakeford and Mansfield v. Peach, (which might affect the titles of purchasers, in case the fact of signature were not expressed in the memorandum of attestation,) an act of parliament was passed (*a*), which enacts, "that every deed or other instrument, already made, with the intention to exercise any power, authority, or trust, or to signify the consent or direction of any person, whose consent or direction may be necessary to be so signified, shall, if duly signed and executed and in other respects duly attested, be, (from the date thereof, and so as to establish derivative titles,) of the same validity and effect, and provable in the like manner, as if a memorandum of attestation of signature, or of being under hand, had been subscribed by the witness; and the attestation expressing the fact of sealing and delivering, without expressing the fact of signing or any other form of attestation, shall not exclude the proof or the presumption of signature." This statute, it is to be observed, is only retrospective.

(*a*) St. 54. G. 3. c. 168.

"by any *deed or writing under the hands and seals* of the parties, to be by them duly executed in the presence of, and *attested by two or more witnesses,*" and the attestation was only of the sealing and delivery, the Court of King's Bench were of opinion, that, in order to make a due execution of the power in this case, the instrument ought to be made with all the forms required by the power, and that there must also be an attestation of its execution with all those forms; and with respect to the second point, which arose here as well as in the case of Wright v. Wakeford, the Court said, it was not necessary to determine at what precise time the attestation must be made, but that the attestation subsequent to the death of one of the parties could not give to their act an operation which it never had during the lives of the parties.

In another case, where lands were limited to such uses as the donee should direct by deed or writing, *under his hand and seal, attested* by two or more credible witnesses, the Court of Common Pleas determined, that the power was not effectually executed by a will, signed and sealed, but attested by the subscribing witnesses as being *signed* in their presence, without noticing the sealing; nor can the defect be cured by calling one of the witnesses to prove, that the will was actually *sealed* in their presence, as well as signed. (1)

And in the case of Moodie v. Reid (2), the same Court determined, that a power, to be executed by a writing signed and published in the presence of attesting witnesses, is not properly executed by an attestation, which notices the signing only, and not the publication. The question in that case arose on a marriage-settlement, which contained a power to limit the uses of money in the funds, by any writing or appointment in the nature of a will, *to be signed and published in the presence of, and attested by two or more credible witnesses;* the testatrix at the close of her will signed her name, and two names were subscribed under the word "witness;" the subscribing witnesses proved, that the testatrix signed in their

(1) Doe dem. Hotchkiss v. Pearce, 6 Taunt. 402. 2 Marshall, 102. S. C.

(2) 7 Taunt. 355.

presence, and that they understood from what the testatrix said at the time of signing, that the paper was her last will. The Court of Common Pleas held, on a case directed for their opinion by the Vice-Chancellor, that the power had not been properly executed. Lord Ch. Just. Gibbs said, "a will, as such, requires no publication; but here the power is to be exercised by a will signed and published; there must be some publication here; the will must be signed, published, and attested; there must therefore be some attestation of signing and publication." After adverting to the difficulty of defining the term "*publication*" as applied to a will; the Lord Ch. Justice added, "I can only suppose it to be that, by which a person designates, that he means to give effect to a paper as his will."

Where, however, the deed creating the power directed, not that the instrument should be *attested* by witnesses, but that the power should be executed by *any writing to be signed and sealed in the presence of two or more witnesses*, and the deed in pursuance of the power was expressed to be executed in the presence of the witnesses, but the attestation applied only to the sealing and delivery, the Chancellor was of opinion, that in such a case it might be properly left to the jury to presume, that the deed was signed, as it professed to be, in the presence of the witnesses, who attested the sealing and delivery. (1)

The rule which has been before mentioned, respecting the sealing by several parties on one piece of wax, and with one seal, is applicable to all deeds at common law; and such sealing will bind the parties, by whose authority the deed is executed. But this rule does not extend to warrants or orders executed under a power. In a case lately determined by the Court of King's Bench (2), where the question was, whether a certificate signed by two churchwardens and one overseer, but bearing only two seals, was a legal and valid certificate under the stat. 8 & 9

(1) M'Queen v. Farquhar, 11 Ves. 467. 17 Ves. 458.

(2) R. v. Austrey, Easter term, 1817, Maule & Selw. MS.

W. 3. c. 30., (which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens,) the Court determined, that the certificate had not been properly executed. The facts of the case were shortly as follow. The certificate was duly attested, and allowed by magistrates, and purported to be the certificate of A. B. and C. D. churchwardens, and of E. F. overseer; one seal was opposite to the two first names and the other seal opposite to the last; no trace of any other seal appeared on the instrument, and the certificate was above thirty years old. Lord Ellenborough C. J. in delivering the judgment of the Court, said, " In considering how far the cases of deeds are applicable to the present, it is to be recollected, that in those cases the parties alone, under whose authority the deeds were executed, are bound by them. But the present is the case of the execution of a power, which binds and operates upon other persons at their peril, and subjects them to indictments as for crimes, in case of their disobedience to the power, if it be duly executed. In the execution of powers, all the circumstances required by the creators of the power, however unessential and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance. (1) It is also a general principle of law, wherever a power is given to particular persons to do a written act in a particular manner or under certain particular circumstances, whether it be to parish officers or magistrates, (as, to grant certificates, under which, if duly executed, other persons, especially public officers, are bound to act — or to grant warrants, or make orders,) that their authority must appear upon the instrument itself. It must thereby appear that they are the persons authorized, and that the certificate, warrant, or order, was made in the manner and under the circumstances required. Otherwise the certificate, warrant, or order, is not obligatory, but void. The statute is to be construed, in a case like this, according to common parlance and understanding, and so as to be a security to persons, who are bound

(1) See Hawkins v. Kemp, 3 East, 410.

to obey the powers given by it at their peril; and it is not to be construed according to what may be brought within its words by nice legal reasoning, applicable merely to deeds. In the case of Thaire v. Thaire (1), where there was a submission to arbitration, "so that the award be delivered under their hands and seals," it was made a question, whether an award sealed but not signed was a good award; the point reserved being, whether the sealing, which was virtually a signing, was sufficient, or whether the words of the submission should be intended in common parlance an actual writing of their hands. The Judges of the Court of Common Pleas were at first divided in opinion on that point. It was finally decided, however, by the whole Court, that a virtual signing would not do, but that there ought to be an actual signing under their hands. So in the present case, where an act is to be under the hands and seals of the three, a mere virtual sealing by any of the three appears to us not sufficient; but it ought to be under the actual distinct seal of each, that is to say, under a distinct and several sealed impression adopted by each of the parties."

Proof of execution by proving the hand-writing of subscribing witness.

If a deed or other written instrument is attested, but none of the witnesses are capable of being examined, the course then is to prove an attesting witness's hand-writing; and this will be a sufficient proof of the execution; as, where the attesting witness is dead — or blind (2) — or incompetent to give evidence, either from insanity (3), or from infamy of character (4), or from interest acquired after the execution of the deed (5), — or where the subscribing witness is absent in a foreign country (6), or out of the jurisdiction of the superior English courts, so as not to be amenable to their process (7), — or where he

(1) Palmer, 109. 112.

(2) Wood v. Drury, 1 Ld. Raym. 734. by Holt C. J.

(3) Vin. Abr. tit. Evidence, (T. b. 48.) pl. 12. Burnett v. Taylor, 9 Ves. jun. 381. Currie v. Child, 3 Campb. 283.

(4) Jones v. Mason, 2 Stra. 833.

(5) Goss v. Tracey, 1 P. Wms. 287. 289. Godfrey v. Norris, 1 Stra. 34. Swire v. Bell, 5 T. R. 371. Buckley v. Smith, 2 Esp. N. P. C. 697.

(6) Coghlan v. Williamson, 1 Doug. 93. Wallis v. Delancey, 7 T. R. 266. (c). Adam v. Kerr, 1 Bos. & Pull. 751.

(7) Prince v. Blackburn, 2 East, 250. 1 Bos. & Pull. 361. Ward v. Wells, 1 Taunt. 161. Hodnett v. Forman, 1 Starkie, 90.

cannot be found after strict and diligent enquiry. (1) * Illness is not a sufficient reason for dispensing with the attendance of a subscribing witness: such a relaxation of the rule has not yet been made, and it would obviously be liable to great abuse. (2)

The proof of the subscribing witness's hand-writing, in the cases above-mentioned, is evidence of the execution of the in-

(1) Anon. case, 12 Mod. 607., by Holt C. J. 7 T. R. 266. Cunliffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 365. Parker v. Hoskins, 2 Taunt. 223. Wardel v. Fermor, 2 Campb. 282.

(2) Harrison v. Blades, 3 Campb. 458, by Lord Ellenborough. The receipts of a tax-gatherer were offered in evidence, and, as he was at the point of death, it was proposed to prove his handwriting. See Jones v. Brewer, 4 Taunt. 47.

* In the case of Cunliffe v. Sefton, (2 East, 183.) it was proved that diligent enquiry had been made after one of the attesting witnesses to a bond at the residence of the obligor and obligee, without being able to obtain any intelligence of such a person; this was considered a sufficient ground for letting in proof of the hand-writing of the other attesting witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. In the case of Crosby v. Percy (1 Taunt. 365.), the Court of Common Pleas held, that proof of the hand-writing of an attesting witness had been properly admitted, after proof that diligent enquiry had been made for him at his usual place of residence, where, in answer to the enquiry, information was received, as also from the father of the attesting witness, that he had absconded to avoid his creditors, and was not to be found. In the case of Wardel v. Fermor (2 Campb 282.), evidence of the hand-writing was admitted, on proof that, twelve months before, a commission of bankrupt had been sued out against the subscribing witness, who had not appeared at the time fixed for his surrender. Secondary evidence was admitted in the case of Parker v. Hoskins (2 Taunt. 223.), an enquiry having been made for the subscribing witness at the Admiralty, whence it appeared by the last report, that he was serving on board of some ship, but in what ship it was not known. It is not possible, by any general rule, to ascertain precisely in what cases this proof of the subscribing witness's hand-writing will be admitted. Each case must depend upon its own peculiar circumstances. But in all cases it ought to be satisfactorily proved, that a reasonable, honest, and diligent enquiry has been made, without any evasion, and without any design to overlook the witness.

strument by the party therein named: the sealing and delivery will be presumed; and, for the purpose of proving *the execution*, it will not be necessary to prove also the hand-writing of the party. (1) * With a view, indeed, to establish the *identity* of the party, that is, that the person, who executed the instrument, is the party to the suit or the party charged, proof of the party's hand-writing will be most important, and the most satisfactory evidence that can be produced. In an action on a bond, or on a promissory note or bill of exchange, some evidence of identity appears to be necessary. (2) Proof of the witness's signature proves only this fact, that the instrument in question was executed by a person in a certain name; it does not prove the other important fact, that the defendant is that person. Some evidence seems necessary to connect the defendant with the bond or note. Proof of his signature on the instrument would be decisive. But such proof is not indispensably necessary; and much slighter evidence would, in the first instance, be sufficient. Evidence, that the defendant was present when the note was prepared by the subscribing witness, will serve to connect him with the instrument. (3)

Proof of execution, in the absence of subscribing witnesses.

Where there is no subscribing witness on the deed; or where the subscribing witness denies having any know-

(1) Prince v. Blackburn, 2 East, 250. Adam v. Kerr, 1 Bos. & Pull. 360. Milward v. Temple, 1 Campb. 375. Gough v. Cecil, 1 Selw. N. P. 516., cited from MS. In the case of Wallis v. Delancey, 7 T. R. 266. n. (*c*), Lord Kenyon held, that the proof of the handwriting of one of the subscribing witnesses, who was abroad, was not sufficient, in an action upon a bond, and that the hand-writing of the obligor should also be proved. Such additional proof might have been necessary in that case, to connect the defendant with the bond. This is not unlikely to have been the ground of Lord Kenyon's opinion. The note of the case is very short; and the ground is not stated.

(2) Nelson v. Whittal, 1 Barn. Ald. 21. See also Memot v. Bates, Bull. N. P. 171. Middleton v. Sandford, 4 Campb. 24.

(3) Nelson v. Whittal, 1 Barn. Ald. 19.

* In the case of a deed executed in the East Indies, and attested by a witness resident there, the stat. 26 G. 3. c. 57. s. 38. enacts, "that it shall be sufficient to prove the hand-writing of *the party to the deed*, and of the attesting witness, and that the witness is resident in the East Indies." When this statute was passed, the present rule respecting the proof of the execution of a deed had not been established.

ledge of the execution, which is the same thing as if there were no witness at all (1); or where the name of a fictitious person is inserted (2); or where the attesting witness was interested at the time of the execution of the deed, and continues so at the time of the trial (3); or where the person, who has put his name as subscribing witness, did so without the knowledge or consent of the parties (4); or if after diligent enquiry nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his hand-writing proved; or if at the time of the execution he was of such an infamous character, as to make him incompetent to give evidence: in these cases, the execution may be proved, by proving the hand-writing of the party to the deed; or by any person present at the execution, though he is not endorsed as witness (5); or by proof of an admission of the party himself, that he executed the deed.

The proof of the party's hand-writing in these cases is a sufficient ground for presuming, that the deed was, as it purports to be, sealed and delivered. (6) In the case of Talbot v. Hodson, an action on a bond (7), the subscribing witness was first called to prove the execution, but on his denying that he saw any thing of the execution, the co-obligor was examined, having had a release to render him competent; this witness stated, that there was a seal on the bond, when the defendant wrote his name opposite, but that the defendant did not seal it in the witness's

(1) Grellier v. Neale, Peake, N. P. C. 145., ruled by Ld. Kenyon. Ley v. Ballard, 3 Esp. N. P. C. 173., by Ld. Kenyon. Fitzgerald v. Elsee, 2 Campb. 635., by Lawrence J. Lemon v. Dean, ib. 636. n. by Le Blanc J. Talbot v. Hodson, 7 Taunt. 251. — Phipps v. Parker, 1 Campb. 412. is therefore over-ruled.

(2) Fasset v. Brown, Peake, N. P. C. 23.

(3) Swire v. Bell, 5 T. R. 371. A defendant cannot object to an attesting witness, as incompetent to prove the execution on account of his interest, after having requested him to attest the execution, with full knowledge of the situation in which he stood. Honeywood v. Peacock, 3 Campb. 196.

(4) M'Craw v. Gentry, 3 Campb. 232. 4 Taunt. 220.

(5) Com. Dig tit. Evidence. (B 3.)

(6) Grellier v. Neale, Peake, N. P. C. 145. Burrows v. Lock, 10 Ves. jun. 474.

(7) 7 Taunt. 251. The jury found a verdict for the plaintiff. Both witnesses, who were called, were very near relations of the defendant.

presence, nor put his hand to the seal, nor delivered the bond as his deed. The Lord Ch. Justice Gibbs considered the circumstance of the defendant's writing his name opposite the seal, on an instrument in which it was affirmed that he sealed, was evidence of a sealing and delivery; and the Court of Common Pleas were of opinion, that the evidence had been properly left to the jury, and that they had drawn the true conclusion.

Proof of hand-writing.

The simplest and most obvious proof of hand-writing is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur, where such a direct kind of evidence cannot possibly be procured. The writing may be secret, as must constantly happen in cases of a fraudulent or criminal nature; or, if any person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence, which the nature of the case admits, is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his hand-writing: for in every person's manner of writing there is a certain distinct prevailing character, which may be easily discovered by observation, and, when once known, may be afterwards applied as a standard to try any other specimens of writing, whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his hand-writing. This course of examination evidently involves two questions; first, whether the supposed writer is the person of whom the witness speaks; and secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second a question of judgment, or a comparison in the mind of the witness between the general standard and the writing produced.

1. Proof by witnesses, who have seen the party write.

This kind of evidence, like all probable evidence, admits of every possible degree from the lowest presumption to the highest moral certainty. It may be so weak, as to be utterly

unsafe to act upon; or so strong as, in the mind of any reasonable man, to produce conviction. The witness may have been in the constant habit of seeing him write, day after day, for years together, on common transactions, and in the course of important business; and what better means can he have of gaining the most accurate knowledge of his manner of writing? On the other hand, it may be found perhaps on enquiry, that he has seen him write only a few words, many years ago, or only once; or the specimens, which he saw, were perhaps slight and imperfect, made in a hurry, at distant intervals, or from some other cause were not the fair average specimens of his general style of writing, but deviations from the common form; in which cases, the impression on the mind of the witness would be faint and inaccurate. But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule, that if he has seen the person write, he will be competent to speak to his hand-writing. (1)

On the trial of Algernon Sidney, as appears from the printed report of that case (2), three witnesses were called to prove a paper to be his hand-writing; the first said, he had seen the prisoner write the endorsement upon several bills of exchange, and that he believed the paper to have been written by him: this evidence was objected to as a comparison of hand-writing, but admitted: the second witness said, he had not seen the prisoner write more than once, but that he had seen his endorsement upon bills, and that the paper was very like it: the third witness said, he had seen several notes, which had come to him with the endorsement of the prisoner's name, and that he had paid them, and had never been called

(1) Lord Preston's case, 4 St. Tr. 446, 447. Francia's case, 6 St. Tr. 70. Layer's case, 6 St. Tr. 275. R. v. Dr. Hensey, 1 Burr. 644. De la Motte's case, Howell's Coll. St. Tr. vol. 21. p. 810. Eagleton and Coventry v. Kingston, 8 Ves. jun. 438. 474. Stranger v. Searle, 1 Esp. N. P. C. 14. Garrels v. Alexander, 4 Esp. 37. If a written paper bear the signature of a person's Christian name and surname, the hand-writing will not be sufficiently proved by a witness who never saw the party write his Christian name; Powell v. Ford, 2 Starkie, 164.

(2) 3 St. Tr. 802.

to account for mis-payment: the whole of this evidence was received. The prisoner, in his defence, still insisted that nothing but the comparison of hand-writing had been offered as proof against him; and the act of parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. That act recites, among other particulars, that "there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet supposed to be his hand-writing, which was not proved by any one witness to have been written by him; *but the jury was directed to believe it, by comparing it with other writings of his.*" (1) However, if the printed report of the trial is correct, something more than the mere comparison of hand-writing was laid before the jury; for, according to that report, the first witness had seen the prisoner write his name several times. And, though it may be objected to the testimony of the two last witnesses, that the endorsements, mentioned by them, were not sufficiently proved to have been written by the prisoner, that objection will not apply to the other witness, whose evidence was certainly admissible. The same kind of evidence was admitted in Lord Preston's case within a year after the reversal of Sidney's attainder, and has been since received in many cases of great authority. (2)

2. Proof by the party's correspondents.

Another method of acquiring a knowledge of hand-writing is by means of a written correspondence. If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's hand-writing. The same questions occur here, as have been before mentioned in the case where a witness speaks from having seen the person write; and in addition to these, one other question arises concerning the identity of

(1) Cited in Layer's case, 6 St. Tr. 279.

(2) See ante, p. 517. And see the case of De la Motte, Howell's Coll. St. Tr. vol. 21. 810.

the person who wrote the letters; and the admissibility of the evidence must depend upon this, whether there is good reason to believe, that the specimens, from which the witness has derived his knowledge, were written by the supposed writer of the paper in question. If this point is clearly proved, the witness, who has received the letters, will frequently be able to give more satisfactory evidence than one who has seen the person in the act of writing; for the latter may have seen him write but seldom, or on occasions which were not likely to excite attention; while the other may have had frequent opportunities of re-perusing the letters, and the letters themselves, having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of hand-writing.

The first reported case, in which the admissibility of this kind of evidence appears to have been decided, is the case of Lord Ferrers v. Shirley, which is thus stated in Fitzgibbon's Reports. (1) "Upon a feigned issue out of Chancery, directed to be tried at bar, whether a deed, pretended to have been executed by the Earl Ferrers in the year 1683, was his deed or not, several witnesses were called to swear to the hand-writing of the subscribing witnesses then dead, and amongst others one J. J., who would have sworn to the name of J. Cottington, whose name was on the deed as a witness, because he had seen several letters written by Cottington: thereupon he was asked whether he had ever seen Cottington write? to which he answered, that he never did, nor ever saw the person that wrote the said letters, but that his master (to whom the letters were written for the rent of a part of the estate of the late Earl Ferrers, which his said master held) informed him they were the letters of Cottington, the Lord Ferrers's steward, who was the person pretended to have attested the deed in question. It was hereupon objected to his testimony, because he could not say with any certainty whether or not the writer of the letters was the same person that attested the deed; for Cottington, who was supposed to write

(1) P. 195.

the letters, might have got some other person to write those very letters for him; and the counsel insisted, that in all cases where a witness would swear to hand-writing, he must be able to say that he saw such a person write. The Court rejected the witness, because he could not ascertain the identity of the person. But Lord Raymond said, "It was not necessary in all cases that the witness should have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out, that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write." Page J. said, "If a subscribing witness to a deed lives in the West Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person, written by him to his correspondent in England, because, under the special circumstances of that case, there is no other way, or at least the difficulty will be great, to prove the hand-writing of such subscribing witness." But Lord Raymond differed, and said, "that these special circumstances could not vary the reason of the thing." It was further objected to the same witness, that he should produce the letters, that the Court and the jury might be able to judge of the resemblance between the hand-writing of the letters and that on the deed; but this was over-ruled by the Court, "because the witness might well have acquired a knowledge of the character of Cottington's hand-writing, by having seen several letters written by him." The rule to be deduced from this case is, that a witness may be admitted to speak to a person's hand-writing, if he has seen letters which can be proved to have been written by him; but that this antecedent proof of the identity of the person is indispensably necessary; and further, that hearsay evidence of identity is totally inadmissible. The case, reported to have been put by Page J., is not very clearly stated. If it is understood to mean, that where a subscribing witness resides abroad, slighter proof of his signature may be given than is necessary in other cases, it certainly cannot be supported; but if the meaning is, that his signature may be

proved in the same manner as if he were dead, by a witness who has seen letters proved to be of his writing, the case is warranted by many later authorities, which have been already mentioned. And with regard to the last objection, namely, that the witness ought to produce the letters, that the jury might judge of the resemblance, it appears to have been made as a preliminary objection to the admissibility of his evidence, and was therefore properly over-ruled. But after the witness has been regularly admitted to give his evidence, it seems reasonable that the opposite party should be allowed not only to cross-examine as to the number and appearance of the writings, which the witness professes to have seen, but also to call upon him to produce the writings in court, that the jury may judge of the means which the witness had of forming his opinion.

Another authority, in support of the rule laid down in Lord Ferrers v. Shirley, is Layer's case (1), on a trial for high treason, where the witness (who had received letters from the prisoner on business five years before, which he answered, and transacted the business according to the directions in the letters, and had been paid for it,) was allowed to speak to the hand-writing of a treasonable paper charged upon the prisoner; and, though the witness in this case had seen the prisoner write some years before the receipt of the letters, yet, independent of that circumstance, his evidence was adjudged to be admissible. If he had formed his judgment of the prisoner's hand-writing from these letters alone, "if the case had gone no further," said the Chief Justice, "nobody could have doubted but that, according to the usual course and rules of evidence, the paper ought to be read." With respect to the interval of time that has elapsed since the witness saw the prisoner write, or received letters from him, that is a circumstance not to exclude him from giving evidence, but to be left with all the other circumstances of the case to the consideration of the jury.

(1) 6 St. Tr. 275. Gold v. Jones, 1 Black. Rep. 384. S. P. 3 Ves. & Beam. 172.

This rule of evidence appears not to have been settled at the time of the memorable trial of the seven bishops, who were tried for a libel in the fourth year of James II. In the course of that trial, a witness, called to prove the signature of one of the bishops, said he had received letters from him on business, and that he had done what the letters required, and that he believed the signature in question to be the bishop's hand-writing, but could not swear that those letters were written by him. (1) This was the strongest evidence in the case, excepting the proof of the archbishop's signature, which was proved by one who had seen him write. But Mr. Justice Powell thought it an objection to the evidence before mentioned, that the witness had never seen the bishop write, and that the receipt of the letters was not sufficient, unless he could also swear who had written them. A long and desultory argument ensued on the admissibility of the paper in question, the counsel for the prosecution insisting, that the signatures of the bishops had been proved, and the counsel on the other side, that the proof was insufficient. Mr. Justice Powell said (2), "he thought the paper had not been sufficiently proved to be subscribed by the bishops. It is too slender a proof for such a case. I grant you," he added, "in civil actions a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman or a correspondent, or the like; but in criminal causes, such as this, if such a proof is allowed, where is the safety of your life, or any man's life here?" The Judges were equally divided in opinion, and the paper was not allowed to be read. Thus it appears, that at that time the rule of evidence, which has been mentioned, was not admitted in criminal cases, though even then it was acknowledged to be reasonable in cases of a civil nature. But this distinction is no longer made. If the rule is true in the one case, it must be equally true in the other; for the rules of evidence, which are the laws of truth, must be uniform and universal.

(1) 4 St. Tr. 338. (2) P. 345.

In the cases which have been mentioned, the proof of hand-writing is founded on a knowledge of the general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question. But no other kind of comparison will be allowed. It is an established rule of evidence, that hand-writing cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. The reason, usually assigned, is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance (1); a reason, however, which appears to be too narrow for a rule of such general application. Another reason, for rejecting such a comparison, seems to be, that the writings intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose, and they are not likely therefore to exhibit a fair specimen of the general character of hand-writing. It has been thought by some an inconsistency in the rules of evidence, to allow a witness to compare in his mind the disputed paper with the impression, which a short and transient view of writings may have made upon his memory; yet, on the other hand, not to permit the jury to compare it with writings, proved to be authentic, present in court, and open for inspection. The only answer which occurs to this objection, is that before suggested, namely, that the writings, which are produced as specimens, having been selected by an interested party to serve a present purpose, are open to suspicion, and liable to the imputation of contrivance.

Comparison of hand-writing.

A witness who has seen a person write, and yet retains no distinct impression of the hand-writing, may be allowed to revive his memory by looking at the paper which he saw written, and which he has kept in his possession, and may then declare his opinion as to the genuineness of the paper in question. "Here," to use the words of the present Chief Justice of the

(1) Macferson v. Thoytes, Peake, N. P. C. 20. Brookbard v. Woodley, Ib. n. (b)

Common Pleas, in a case of this nature, "a basis is laid in the fact of the witness having seen the defendant once sign his name. But his memory is defective. He then recurs to a paper, which he knows to be an authentic writing. He uses it to retouch and strengthen his recollection, and not merely for the purpose of comparison."(1) If a witness, after seeing a person write only once, is allowed to give his opinion on the similarity of handwriting, from the impression which that solitary specimen of writing has left upon his mind, though he may not have seen the specimen since it was first written; *à fortiori* is the witness competent, if he has kept the impression fresh and strong by a frequent inspection of the writing, or if he has had an opportunity of restoring the first impression even by a single perusal. A perusal of this writing, even at the moment when the witness is called upon to give his opinion on some other paper, may serve to strengthen the memory, and for that purpose seems to be strictly regular. There would be great danger in allowing papers, which the witness has not seen written, to be put into his hand, under pretence of reviving his recollection; the danger is, that such a contrivance would not restore the impression formerly produced, but rather serve to create a new and different impression; to permit an inspection of such papers, with a view to assist the witness in judging of some other disputed paper, would in effect be admitting a comparison of hand-writing: but in the case proposed, where the witness looks at the identical paper, which he saw written, and from which his mind received the only impression it ever had of the writer's style, there is no danger of contrivance or collusion; and the mind must surely be better able to form an opinion, when the memory has thus been strengthened and refreshed, than when it trusts only to the first fleeting impression, which from want of retouching would become gradually fainter and more indistinct.

Exception in the case of ancient writings.

When the antiquity of a writing, purporting to bear a person's signature, makes it impossible for a witness to swear,

(1) Burr v. Harper, Holt, N. P. C. 420.

that he has ever seen the party write, it has been held sufficient, that the witness should have become acquainted with his manner of signing his name, by inspecting other ancient writings which bear the same signature, provided those ancient writings have been treated and regularly preserved as authentic documents. Thus, where a parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish-books, in which the same parson's name was written, was permitted to swear to the similitude of the hand-writing; "for it was the best evidence in the nature of the thing, for the parish-books were not in the plaintiff's power to produce." (1) Hence it may be inferred, that if the parish-books could have been produced, they might have been brought into court, and a comparison made between those signatures and the signature in question. And this inference is supported by two late cases (2), in which a signature in an entry, purporting to have been made by a person long since deceased, was allowed to be compared with another signature of the same person in a deed of settlement, and this evidence by comparison was admitted, on the ground, that at such a distance of time no better evidence of the fact could be obtained. *

(1) By Lord Hardwicke in Chanc. Dec. 1746, cited in Bull. N. P. [236.]

(2) Brune v. Rawlins, 7 East, 282. n. (*a*), ruled by Le Blanc J.; Morewood v. Wood, 14 East, 328. S. P. See Randolph v. Gordon, 5 Price, 317.

* In an earlier case, before Mr. Justice Yates, this kind of evidence was rejected. The plaintiff in that case, in support of a modus, produced a paper containing a particular of tythes, and said to be the hand-writing of the deceased rector. In order to prove that this was the writing of the rector, whose name it bore, the plaintiff's counsel offered to produce several returns of births and burials in the parish, purporting to have been made and signed by the same rector; and on comparing the signature on the returns with that on the paper, the hand-writing, it was said, would appear to be by the same person. But Mr. Justice Yates rejected the evidence. Brookbard v. Woodley, Appendix to Vin. Ab. vol. 4. 267. Peake, N. P. C. 20. S. C.

Evidence as to genuineness of hand-writing.

In a case, where the question was, whether a will had been forged, a clerk of the general post office, who had been regularly employed to inspect franks and detect forgeries, was admitted by the Court of King's Bench, on a trial at bar, to speak to the general appearance of the hand-writing of the will, and to give his opinion, whether it was written in a natural or imitated character. (1) The judges considered it entirely a question of art, which might be answered by a witness of skill and experience. The witness, however, in his examination, admitted that he had never detected an imitation of the hand-writing of an old person, who wrote with difficulty, and might be supposed frequently to stop; and that they judged principally by seeing, whether the letters were what they called *painted*, or passed over by the pen a second time, which might happen to any person from a failure of ink. In the same case, after the witness had proved that the will was not genuine, he was shewn a paper admitted to have been written by a person suspected of forging the will, and was then asked, whether in his opinion that paper and the will had been written by the same person. The question was objected to, but admitted by the Court; yet this was evidently a mere comparison of hand-writing, and a sort of comparison the least of all to be trusted, as it was an attempt to trace a resemblance between two papers, which the writer would endeavour to make as unlike as possible. This subject was much discussed in the case of the King v. Cator (2), tried before Mr. Baron Hotham, from which case this distinction may properly be made, namely, that persons of skill may be called to ascertain whether hand-writing is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the hand of another; but they cannot be allowed to give their opinion on this point, whether the same hand, which wrote another paper, wrote also the feigned paper.

(1) Revet v. Braham, 4 T. R. 497. (2) 4 Esp. N. P. C. 117. 145.

Sect. III.

Of the Proof of Wills.

The statute of frauds enacts (1), that all devises of lands or tenements devisable by that statute, or by the statute of wills (2)*, or by force of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and to be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of no effect. Form of will.

This clause describes the solemnities, which ought to attend the execution, and particularly adverts to the character of the witnesses and the situation of the devisor, at the moment when the act of attestation is performed. "That the statute had a main view to the quality of the witnesses," said Lord Witnesses.

(1) St. 29. C. 2. c. 3. s. 5.

(2) St. 32 H. 8. c. 1., explained by St. 34 H. 8. c. 5.

* The statutes of the 32d and 34th of Henry VIII. gave the power of devising to such persons only as held by socage, and had an estate of inheritance in fee-simple. But copyholds, not being held by socage-tenure, could not be devised under these statutes, nor were they made devisable by any clause in the statute of frauds; they were considered to be in their nature not properly the subject of a devise, as not passing by a will merely as a will, but by will and surrender taken together. The practice used to be, to surrender to the use of the owner's last will, and on this surrender the will would operate as a declaration of the use, and not as a devise of the land itself. A devise therefore of copyhold lands, or of customary lands which pass by surrender and admittance, would not require any attestation; nor would it require a signature, unless a signature were made necessary by the terms of the surrender to the use of the will. Wagstaff v. Wagstaff, 2 P. Wms. 258. Tuffnell v. Page, 2 Atk. 37. Carey v. Askew, 2 Bro. Ch. Rep. 58. Doe dem. Cook v. Danvers, 7 East, 299. 322. But it has been enacted by a late act of parliament, st. 55 G. 3. c. 192. that a disposition of copyhold estates by will shall be effectual without a previous surrender to the uses of the will.

Camden in the case of Hindson v. Kersey, "will appear from this consideration, namely, that a will is the only instrument in it required to be attested by subscribing witnesses at the time of execution; while leases, marriage agreements, declarations, and assignments of trusts were only required to be in writing and signed. These are transactions of health and protected by valuable considerations, and antecedent treaties; but a will is often executed suddenly in a last sickness, and sometimes in the article of death; and the great question to be asked in such cases is, whether the testator was in his senses when he made the will? and consequently the time of the execution is the critical moment, which requires guard and protection. What is the employment of the witnesses? It is to inspect and judge of the testator's sanity before they attest, and if he is not capable, they ought to refuse to attest. In other cases, the witnesses are passive, here they are active, and in truth the principal parties to the transaction. The testator is intrusted to their care."(1)* According to this reasoning, the credibility or competency of the witnesses, (for the term "credible" is to be construed in this passage as synonymous with "competent,") must be considered with reference to the time of attestation; so that, if one of three attesting witnesses would have been incompetent to give evidence at the time of his subscribing, as from want of reason,

(1) Hindson v. Kersey, 4 Burn. Eccl. L. 88.

* There has been a difference of opinion respecting the meaning of the term "credible" in the fifth section of the statute of frauds. Lord Mansfield thought it inaccurate, and that it had slipped into the statute as a word of course; and that the witnesses need not be competent, as that word is understood in law, at the time of the execution. "If all the witnesses," said Lord Mansfield, "swear that the testator did not execute, if they had at the time the worst characters, and had committed the most infamous actions, yet their attestation answers the necessary form, because the testator meant to comply with the law, and might not know them to be bad men. Objections to the sufficiency of the subscribing witnesses," he added, "should be left to be judged of, as cases arise, by general principles, by analogy to the law of witnesses in other instances, and by arguments drawn from the natnre and fitness of the thing with regard to justice, convenience, and the intent of the statute." Wyndham v. Chetwynd, 1 Burr. 418. 419.

or from conviction of some infamous offence,) (1) the will is not duly executed within the statute of frauds. Upon this principle it was determined, soon after the passing of the statute, that a devisee could not attest a will, under which he took an interest. (2) But considerable doubts were afterwards entertained, whether the competency of such an interested person might not be restored by a release, payment, or extinguishment of all his interest, so as to admit him to prove the execution. (3) In consequence of this difference of opinion, the legislature passed an act, which, (after reciting, that it had been doubted, who were to be deemed legal witnesses within the statute of frauds,) enacts (4), that "if any person shall attest the execution of any will or codicil, (to whom any beneficial devise, legacy, estate, interest, gift, or appointment affecting any real or personal estate, except charges on land, &c. for payment of debts shall be given,) such devise, legacy, &c. shall, so far only as concerns such person attesting the execution, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy, &c. And in case any will or codicil shall be charged with any debt, and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act: Provided always, that the credit of every such witness so attesting the execution of any will or codicil in any of the cases within this act, and all circumstances relating thereto, shall be subject to the consideration and determination of the Court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of, in like manner as the credit of witnesses in all other cases ought to be considered and determined." It had been determined, long before

(1) Pendock v. Mackinder, Willes's Rep. 665.

(2) Hilliard v. Jennings, 1 Lord Raym. 505. Com. Rep. 91. S. C.

(3) See on this subject Anstey v. Dowsing, 2 Stra. 1253. Wyndham v. Chetwynd, 1 Burr. 414. Hindson v. Kersey, 4 Burn. Eccl. L. 88

(4) St. 25 G. 2. c. 6. s. 1, 2. 6.

this act, that an executor, who took nothing under the will, and had no interest in the surplus, was a competent witness to prove the will in a cause concerning the estate. (1)

Proof of contents of will

The best proof of the contents of a will is the original will itself. An exemplification under the great seal is not evidence in an action of ejectment (2); nor is the probate of a will in the spiritual court any proof of a devise of real property (3), even where the original is lost (4), for that court has no power to grant a probate of such devises, or to authenticate them on its rolls. But where the contents of a will are given in evidence, not to establish a devise, but merely for the purpose of proving a pedigree stated in the will, the rolls of the spiritual court, which has authority to enroll, have been thought admissible. (5) And similar evidence has been admitted, where a party to the suit had no right to the possession of the will, and could not produce the original. Thus, in an avowry for a rent-charge, where the avowant claimed under a will, which he could not produce, as it belonged to the devisee of the land, the ordinary's register of the will and proof of former payments were held to be sufficient evidence against the plaintiff, who was the devisee of the land charged. (6) In such a case, however, though the party cannot produce the will, he ought to give notice to the other party to produce it. (7)

Proof of execution by subscribing witness.

The execution of a will is to be proved by the subscribing witnesses, if they are alive and can be produced. On a trial at common law, all the circumstances may be proved by a single witness; that is, upon the supposition, that there are two others who would be allowed to give the same testimony. (8) If the opposite party disputes the regularity of

(1) Anon. case, 1 Mod. 107. Bettison v. Sir R. Bromley, 12 East, 250. Phipps v. Pitcher, 1 Maddock, Rep. 144. 6 Taunt. 220. S. C.
(2) Comberb. 46.
(3) See ante, p. 336.
(4) 1 Ld. Raym. 732.; See St. Legar v. Adams, 1 Ld. Raym. 731. Skinner, 174.
(5) See ante, p. 398.
(6) Anon. case, Rep. temp. Holt, 298.
(7) See ante, p. 275.
(8) By Lee C. J. in Anstey v. Dowsing, 2 Stra. 1254. Bull. N. P. 264.

the execution, he may call any of the other witnesses; but a devisee will not be obliged to call the rest, if one alone can prove all the requisites to establish the validity of the will. This is the rule in courts of common law. But on a bill filed in Chancery to establish a will, the rule is, that all the witnesses ought to be examined by the plaintiff. "It is the invariable practice in Chancery," said Lord Camden in the case of Hindson v. Kersey (1), "never to establish a will, unless all the witnesses are examined, because the heir has a right to proof of sanity from every one of those, whom the statute has placed about his ancestor." And on the trial of an issue directed by the Court of Chancery, to examine the validity of a will, all the attesting witnesses ought to be examined; for the issue is part of the proceedings of the court. When the court sends an issue to be tried, it reserves to itself the review of all that passes; and there would be an inconsistency in requiring, that all the three witnesses should be examined in the Court of Chancery, yet dispensing with their examination on the trial of an issue at law. (2)

The facts, to be proved by the subscribing witnesses, are, that the devisor signed the will, or that another person signed in his presence and by his express direction, and that the witness and two others attested and subscribed in the presence of the devisor.

Signing.

First, as to the signing by the testator, it is not material in what part of the will he makes his signature. The statute prescribes no particular form, and does not require him to subscribe, but simply to sign. It was therefore determined, in a case soon after the passing of the statute, that, if the testator writes his name at the beginning or on the side, the signing is sufficient. (3) But where a will consisted of several distinct sheets, some of which the testator signed, and intended

(1) 4 Burn. Eccl. L. 93. Ogle v. Cook, 1 Ves. 177.; Townsend v. Ives, 1 Wils. 216. S. P.

(2) Bootle v. Blundell, 1 Cooper, Ch. Rep. 136

(3) Lemayne v. Stanley, 3 Lev. 1. Hilton v. King, 3 Lev. 86. 9 Ves. jun. 248.

to sign the rest, but was not able, Lord Mansfield thought this was not a signing of the whole will. (1) According to Freeman's report of the case of Lemayne v. Stanley (2), the Court said, "It is not necessary to write; for some cannot write, and their mark is then a sufficient signing; others have their name on a stamp, and that is good enough." In that case also, three Judges held, that if the testator had put his seal, that would have been of itself a sufficient signing within the statute; but Levinz J. doubted, on the authority of a case in Rolle's Abridgment, where the Court held, that an award, which by the submission ought to have been *signed* by the arbitrator, was not good in law, because it had been only *sealed*. (3) Lord Raymond ruled in a case at nisi prius (4), and Lord Holt is also reported to have said (5), that sealing was a signing within the statute. But later authorities appear to have considerably shaken this doctrine (6); and now the established rule seems to be, that sealing without signing is not a sufficient execution of the will. A bare sealing certainly cannot answer the purposes which the legislature had in view; it cannot identify the instrument, nor does it bear, like writing, any peculiar character. "The statute," said Lord Hardwicke, in one of the cases upon this subject (7), "by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then how can it be said, that putting a seal to it would be a sufficient signing; for any one may put a seal; no particular evidence arises from sealing; common seals are alike; no certainty or guard arises from thence."

In a late case, where it appeared that the testator was blind, the Court of Common Pleas determined, that it was not neces-

(1) Right dem. Cater v. Price, 1 Doug. 241. 9 Ves. 249. Walker v. Walker, 1 Merivale, 503.

(2) P. 538. See also Hindson v. Kersey, 4 Burn. Eccl. L. 92. S. P. by Pratt C. J.

(3) See ante, p. 512.

(4) Warneford v. Warneford, 2 Stra. 764.

(5) Lee v. Libb, 1 Show. 68.

(6) Smith v. Evans, 1 Wils. 313., by Parker C. B. and the two other Barons present: Grayson v. Atkinson, by Lord Hardwicke, 2 Ves. 459.; Ellis v. Smith, 1 Ves. jun. 11., by Parker C. B., Willes C. J., and Sir J. Strange. See also 17 Ves. 458. 18 Ves. 175.

(7) 2 Ves. 459.

sary to read over the will, previous to the execution, in the presence of the attesting witness. (1) "The statute of frauds," said Mr. Justice Heath on that occasion, "only requires that the testator shall execute the will in the presence of the attesting witnesses, and in ordinary cases when that is done, all is done that is necessary. In the case of a blind man, stronger evidence would be required than the mere attestation of signature, but in this case there was that stronger evidence, which the peculiarity of the case seems to call for. In the course of the argument sufficient attention has not been paid to the distinction between what shall be deemed a literal compliance with the provisions of the statute, and what sufficient proof to rebut any imputation of fraud. The question of fraud is for the jury entirely, and here they found the will to be a valid will."

Attestation.

The subscribing witnesses are to attest the signing; but the statute does not direct that they shall see the testator sign, or that he should sign in their presence. It requires only an attestation of the signing. Now, at the time of making that act of parliament, and ever since, if a bond or deed had been signed by the party, who afterwards acknowledged it to be his hand-writing before witnesses, that was always considered to be evidence of the signing by the person executing, and a sufficient attestation by the subscribing witnesses (2): and the rule is precisely the same, where a note or declaration of trust, or any other instrument which requires a bare signing, is acknowledged before witnesses. From analogy to these cases, it has been determined in the case of wills, that the subscribing witness need not see the act of signing, but that it will be sufficient, if the testator has acknowledged to them, either to each separately or to all at the same time, that the will is his, or that the signature is his hand-writing. (3) And the subscribing witnesses need not express in their attestation, that they

(1) Longchamp v. Fish, 2 New Rep. 415.
(2) 2 Ves. 457. See ante. p. 506.
(3) Stonehouse v. Evelyn, 3 P. Wms, 253. Grayson v. Atkinson, 2 Ves. 454. Ellis v. Smith, 1 Ves. jun. 11. Addy v. Grix, 8 Ves. 504. Westbeech v. Kennedy, 1 Ves. & Beam. 362.

subscribed their names in the presence of the testator; but whether they did so subscribe, is a question for the consideration of the jury, to be determined upon the evidence. (1)

The statute requires the witnesses to attest the signing and to subscribe, but does not direct that they shall be all present at the same time; and although an attestation and subscription by all the witnesses at the same time would be the best security against fraud and imposition, by making each a check upon the other, yet in the interpretation of the statute courts of law early determined, and it is now an established rule of property, that the witnesses may subscribe at several times. (2) An attestation by a mark has been adjudged to be a sufficient subscription within the meaning of the statute. (3)

It is not necessary that the testator should declare the instrument, executed by him, to be his will, or that the witnesses should attest every page, or that every page should be particularly shewn to them. (4) The whole will, however, ought to be present at the time of attestation; for if a person makes a will on several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the will, this is not a sufficient execution. (5) But unless there is positive proof that the entire will was not in the room, the question, whether it was so or not, is a question of fact, to be left with all the particular circumstances of the case to the consideration of the jury. (6)

Attestation in presence of testator.

The witnesses are to attest and subscribe in the presence of the testator; and as the object of this provision was to guard against fraud, and prevent the substitution of a false will in the place of the true one, the obvious meaning of th

(1) Brice v. Smith, Willes's Rep. 1. 4 Taunt. 217. As to the execution of wills, under powers, see ante, p. 507.

(2) Cook v. Parsons, Prec. in Chan. 185. Jones v. Lake, 2 Atk. 177., in note. S. P., admitted in 2 Ves. 458., and in 1 Ves. jun. 14.

(3) Harrison v. Harrison, 8 Ves. 185. Addy v. Grix, ib. 504.

(4) Bond v. Seawell, 3 Burr. 1773. 1 Black. Rep. 407. 422. 454.

(5) Lea v. Libb, 3 Mod. 262. 1 Eq. Cas. Ab. 403. S. P.

(6) Bond v. Seawell, 3 Burr. 1773.

statute must be, that the testator should be in such a state of mind, and in such a situation, as to be capable of seeing the witnesses in the act of subscribing. It will not be a good execution, if the testator was in a state of insensibility (1), or if it was impossible for him to see the witnesses subscribe. "It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate, if a man should turn his head back, or look off, that would vitiate the will." (2) But if the jury find the fact, that the testator might have seen what was passing at the time of the subscribing, then it will be presumed in favour of the attestation, that the testator actually saw what he might have seen. In one case, the testator was sick in bed, and the witnesses withdrew into a gallery, and there subscribed it; between which gallery and the bed-chamber, where the testator lay, there was a lobby with glass doors, and part of the glass was broken. (3) In another case, the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that and the door of the testator's room were open. (4) In a third case, the testatrix sat in her carriage opposite the window of her attorney's office, in which office the witnesses subscribed their names. (5) In all these cases, (and in others, which might be mentioned to the same effect, differing only in their peculiar circumstances,) the execution was held to be sufficient, the material fact being proved, that the testator might have seen the attestation, if he had chosen to look.

Proof of attestation.

If one of the subscribing witnesses can prove the execution, (as, that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his

(1) Cater v. Price, 1 Doug. 241.
(2) Shires v. Glascock, 2 Salk. 687.
(3) Sir G. Sheers's case, cited Carth. 81.
(4) Davy and another v. Smith, 3 Salk. 395
(5) Casson v. Dade, 1 Brown. Ch. C. 99. See also Doe dem. Wright and others v. Manifold, 1 Maule & Selw. 294.

presence,) this will be a sufficient proof of the will without calling the others. But if the witness, who is called, can only prove his own share in the transaction, as must happen, where the testator acknowledged his signing to the witnesses separately, the other witnesses ought in that case to be called. If they are dead, or insane, their hand-writing, and the hand-writing of the testator, ought to be proved; it will then be a question for the jury, whether under the circumstances of the case it is probable, that all the formalities of the statute were regularly observed. (1) The clause of attestation generally expresses, that the witnesses subscribed in the presence of the testator; but such a statement is not absolutely necessary; and though it is entirely omitted, the omission will not conclude the jury from finding, that the will was so subscribed. In the case of Croft v. Pawlet (1), the attestation was, that the will had been signed, sealed, published, and declared as his last will, in the presence of the subscribing witnesses; the witnesses being dead, and their signatures proved in the common way, it was objected, that this was not an execution according to the statute of frauds; for the signatures of the witnesses could only stand as to the facts to which they had subscribed, and signing in the presence of the testator was not one; but the Court were of opinion, that this was a matter of evidence to be left to the jury, and they gave a verdict in favour of the will.

Subscribing witness abroad.

If a subscribing witness is abroad, who ought to be called if he could be produced, his hand-writing may be proved in the case of a will, as in cases on the execution of a deed, and the rule appears to be the same in courts of equity. Thus where a question arose, whether it was necessary to send out a commission to examine one of the witnesses, who was in Jamaica, Lord Alvanley, then Master of the Rolls, held that it was not necessary to have his examination, but that the case was the same, as if the witness were dead (2):

(1) Hands v. James, 2 Comyns's Rep. 530. Croft v. Pawlet, 2 Stra. 1109. Brice v. Smith, Willes's Rep. 1. S. P.

(2) Ld. Carrington v. Payne, 5 Ves. 411.

the heir at law, he observed, did not make a point of it, but submitted it to the Court; and he cited a case, where it was thought not only unnecessary, but very dangerous to send the will abroad. And in another case, where it was objected that one of the witnesses was abroad, Lord Chancellor Thurlow said, he doubted, whether the rule had ever been laid down so largely, as that the will could not be proved without examining all the witnesses, although that had been the practice. (1)

Witness, denying or impeaching the execution.

If a subscribing witness should deny the execution of the will, he may be contradicted as to that fact by another subscribing witness; and even if they all swear, that the will was not duly executed, the devisee would be allowed to go into circumstantial evidence to prove the due execution. (2) If one of the subscribing witnesses impeach the validity of the will on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, the devisee may give evidence of their general good character. (3)

Proof of old wills.

When the subscribing witnesses are dead, and no proof of their hand-writing can be obtained, as must frequently happen in the case of old wills, it will be sufficient to prove the signature of the testator alone. In a case (4), where the

(1) Powel v. Cleaver, 2 Brown. Ch. C. 504. See Grayson v. Atkinson, 2 Ves. 460.

(2) Austin v. Willes, Bull. N. P. 264. Pike v Badmering, cited 2 Stra. 1096. Lowe v. Joliffe, 1 Black. Rep. 365.

(3) Vide supra, p. 503.

(4) M'Kenire v. Fraser, 9 Ves. jun. 5.*

* In Calthorpe v. Gough and others, at the Rolls, (4 T. R. 707. n. (a), 709. n. (†),) a will thirty years old, reckoning from the date of the will not from the testator's death, was not proved by witnesses, and it was said at the bar, that proof was not necessary on account of the age of the will; and in support of this a case of Mackery v. Newbolt was cited, in which Sir Lloyd Kenyon, then Master of the Rolls, decided, that a will above thirty years old should be read without proof, although the testator had died very recently. That point, however, was not decided in the case of Calthorpe v. Gough, because the plaintiff, the heir at law, admitted the will, and claimed under it. See on this subject, Lord Rancliffe v. Parkyns, 4 Dow. Rep. 202.

hand-writing of two subscribing witnesses was proved, and no account could be given of the third, the will being above thirty years old, and the testator having been dead for twenty years, an objection was made to the proof of the will; but the Master of the Rolls said, he could not see any distinction in this respect between a will and a deed, except that the former, not having effect till the death, wants a kind of authentication, which the other has; that is, from the nature of the subject; but in this case, he added, I think the proof sufficient; for in a late case in the Court of King's Bench, Cunliffe v. Sefton (1), an enquiry of the same kind was held sufficient. The Master of the Rolls therefore held, that the execution of the will had been sufficiently proved.

(1) Vid. sup. p. 513.

CHAP. IX.

Of Stamping, as a Requisite of Written Instruments.

General rule. A WRITTEN instrument, which requires a stamp, cannot be admitted in evidence, unless it be duly stamped; and no parol evidence will be received of its contents. If, therefore, the instrument produced is the only legal proof of the transaction, and that cannot be admitted for want of a proper stamp, the transaction cannot be proved at all (2); as, in an action for use and occupation, if it appear that the defendant held under a written agreement, which for want of a stamp cannot be received, the plaintiff will not be allowed to go into general evidence; for the agreement is the best evidence of the nature of the occupation. (3) Parol evidence of a lost agreement cannot be received, if the agreement was on unstamped paper; though it has been wrongfully de-

(2) R. v. St. Paul's, Bedford, 6 T. R. 452. Hodges v. Drakeford, 1 New Rep. 271.

(3) Brewer v. Palmer, 3 Esp. N. P. C. 213. Doe dem. St. John v Hore, 2 Esp. N. P. C. 724. Ramsbottom v. Mortley, 2 Maule & Selw. 445.

stroyed by one of the parties, yet the other party will not be permitted to prove its contents by parol evidence; this is one of the risks which attends the omission to have the agreement properly stamped, that, if any accident happen to it, before the stamp is affixed, all remedy by action is entirely gone. (1)

Proof of the transaction without writing.

But it may happen in a variety of cases, that the transaction is capable of being proved by other evidence besides the written instrument; and the objection arising from the stamp acts may be avoided by resorting to that other species of proof. Thus, although an unstamped receipt for the payment of a bill is not admissible in evidence, yet the fact of payment may be proved by a witness, who saw the money paid; and even such an unstamped receipt may be shewn to the witness as a memorandum to refresh his memory. (2) So, in an action on a promissory note, though the plaintiff cannot give the note in evidence, unless it is duly stamped, yet he will not be precluded from recovering on one of the general counts of the declaration, if he can prove an admission of the original debt, or give other evidence of a consideration received by the defendant. (3) And so, when a party to the suit admits on the record that, which, if not admitted, the other party must regularly prove, it cannot be necessary to produce that evidence, which would otherwise be required. Thus, where an action is brought upon an agreement, which ought to be stamped, and the form of the pleading is such, as to make it unnecessary at the trial to produce the instrument, (as, if it is admitted on the record, and the trial is upon issues collateral to the existence of the agreement,) a court of law will not examine, whether the instrument is legally available with reference to the stamp acts. (4)

(1) Rippener v. Wright, 2 Starkie, 478.

(2) Rambert v. Cohen, 4 Esp. N. P. C. 213. Jacob v. Lindsay, 1 East, 460.

(3) Farr v. Price, 1 East, 57. Alves v. Hodgson, 7 T. R. 243. Tyte v. Jones, 1 East, 58. n. (*a*). Brown v. Watts, 1 Taunt. 353. Wade v. Beasley, 4 Esp. N. P. C. 7.

(4) By Ld. Eldon Ch., 11 Ves. 596. Thynne v. Protheroe, 2 Maule & Selw. 553.

So, where a plaintiff filed a bill in Chancery for the specific performance of an agreement contained in a correspondence between him and the defendant, and the answer of the defendant admitted the letters, insisting only, that they did not amount to an agreement, the Court held that such an admission dispensed with the necessity of producing the letters, and that no objection to the agreement could be taken for the want of a stamp. (1)

Foreign instrument.

Written agreements and other instruments, made in a foreign country, are not admissible in evidence in any of our courts, unless duly stamped by the laws of that country; if they are not obligatory abroad, they cannot be enforced here. Where a promissory note had been made in Jamaica, but not stamped as it ought to have been by the laws of the island, the Court of King's Bench held, that a party could not recover here upon the note. (2) The party, who takes this objection to the validity of the instrument, will have to shew, that a stamp was necessary by the law of the country; and for this purpose an authenticated copy of the law ought to be produced. (3) If a person resident abroad desire his correspondent in England to fill up a bill of exchange, and return it to him to be signed, and he afterwards signs it abroad, the bill does not require to be stamped, as if it had been drawn in this country; and the rule is precisely the same, whether he signs his name as drawer, before or after he sends it over to this country to be filled up by his correspondent. (4) In the case of Snaith v. Mingay (5), which was an action by an indorsee against the indorser, a person resident in Ireland subscribed his name in the character of drawer, and afterwards as first indorser, on a paper, which was properly stamped according to the revenue laws of Ireland, and had every mark to designate it as a

(1) Huddleston v. Briscoe, 11 Ves. 583.

(2) Alves v. Hodgson, 7 T. R. 241. Clegg v. Levy, 3 Campb. 166. Crutchly v. Mann, 5 Taunt. 529.

(3) Buchanan v. Rucker, 1 Campb. 65. Le Cheminant v. Pearson, 4 Taunt. 367. Millar v. Heinrick, 4 Campb. 155.

(4) 1 Maule & Selw. 94.

(5) Ibid. 87.

bill of exchange; he then sent it over to this country with authority to his correspondent to insert the day of the date, the sum, and the name of the drawee; and it did not appear, that there was any intention of evading the stamp laws, or any imputation of fraud in the transaction: under these circumstances the Court of King's Bench were of opinion, that the bill was an incipient bill in Ireland, though it was completed here, and that, after it had been completed, it was to be considered as a bill of exchange from the time of its being signed by the drawer; and consequently that an English stamp was not necessary.

Denomination of stamp.

It is not sufficient that the stamp used is of the proper value; the stamp must also be of the proper denomination, that is, the peculiar stamp appropriated to the particular species of instrument. (1) A receipt-stamp will not avail, if used upon a promissory note; nor a note-stamp, if used upon a receipt. So, articles of agreement under seal require a deed-stamp; an agreement-stamp will not be sufficient, though it may be of greater value. (2) An instrument, containing a present demise of a house, containing also an agreement for goods and fixtures in the house, requires a lease-stamp, the one contract being auxiliary to the other; and, unless it is so stamped, cannot be given in evidence as an agreement for the sale of the goods, in an action to recover the amount. (3) The statute 37 G. 3. c. 136. contemplates the mistakes, which may arise in the use of stamps, and makes provision for those mistakes. It enacts, that where any instrument, (except bills, notes, and drafts,) shall have been stamped with a stamp of a different denomination, but of equal or greater value than that required by law, the commissioners, upon payment of the duty and a penalty of 5l., may stamp the same with a proper stamp. With respect to bills and notes, (which by statute 31 G. 3.

(1) Stat. 37 G. 3. c. 136. s. 1. Stat. 48 G. 3. c. 149. s. 4. Chamberlain v. Porter, 1 New Rep. 30. Wilson v. Vysar, 4 Taunt. 288. Doe dem. Dyke v Whittingham, 4 Taunt. 21.

(2) Robinson v. Drybrough, 6 T. R. 317.

(3) Corder v. Drakeford, 3 Taunt. 382.

c. 25. were forbidden to be stamped after they were made,) the statute of the 37th G. 3. provides, that bills and notes, which should be made subsequent to that act, and stamped with an improper stamp, but of equal or greater value than the stamp required, may be stamped by the commissioners on payment of the duty and a penalty. But bills and notes, made before that act, remain in the same situation as if the act had not passed. The statute 43 G. 3. c. 127. s. 6. provides, that, if the stamp is of the proper denomination, it shall not be ineffectual from being of a greater value than the stamp acts require. Before this act, a stamp of greater value, though of the proper denomination, had been determined to be insufficient. (1) And the statute 55 G. 3. c. 184. s. 10. provides, that all instruments, upon which any stamp shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole than the stamp, which ought regularly to have been used, shall be deemed valid and effectual in law, except in cases, where the stamp used in such instruments shall have been specifically appropriated to any other instrument by having its name on the face. In the case of Taylor v. Hague (2), indeed, before the statute of the 43 G. 3. the Court held, that a promissory note, upon a stamp of a higher value than was required, would be available, on the particular ground, that the value was composed of three different sums applicable to several funds, to which the duties on promissory notes were carried.

Several stamps, when necessary.

A question has often arisen, whether an instrument, to which several persons are parties, require several stamps, or whether a single stamp is sufficient. And the distinction established is, that if the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all the parties (3), there a single stamp will be sufficient; but where the parties have separate interests in se-

(1) Farr v. Price, 1 East, 55.
(2) 2 East, 414.
(3) 13 East, 246.

veral subject-matters, there ought to be a separate stamp for each party, against whom, or in whose favour, the instrument is offered in evidence.

To illustrate the first part of the rule, if a debtor compounds with his creditors, and each creditor sign the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition; there, every covenant is in fact a separate covenant, and the several deed of each creditor, who signs the deed; but the whole being only one transaction, a separate stamp for each person is not required. (1) So, if several persons bind themselves severally in a penalty by one bond, conditioned for the performance of certain acts by each and every of them, such a bond requires only one stamp. (2) Upon the same principle, it has been held, that an agreement relating to the prize shares of different persons, though several as to the share of each, yet being payable in respect only of one entire fund, is only chargeable with one stamp (3). And on the authority of this case, the Court of King's Bench determined in a very late case, that a single stamp was sufficient for an agreement, which several persons had entered into for a subscription to one common fund, for the purpose of constructing a dock. (4) In the case of Jones v. Sandys (5), the question was, whether a bond, in the condition of which a mortgage-deed was mentioned, ought to have had two stamps: and the Court held that it was not necessary; and in delivering their opinion, they mentioned the cases of bargain and sale, lease and release, mortgage with covenant to pay the money, as constantly charged with only the single duty.

But the rule is different, where the instrument includes in effect several transactions, and the subject-matter is distinct as to the several parties. Thus, an instrument, containing

(1) 1 New Rep. 278. Goodson v. Forbes, 6 Taunt. 171. 1 Marshall, 525. S. C.

(2) Bowen v. Ashley, 1 New Rep. 274.

(3) Baker v. Jardine, 12 East, 235. n. (b.)

(4) Davis v. Williams, 13 East, 232.

(5) Barnes, 463.

the admissions of several persons to a corporation, requires as many stamps as there are admissions. This was determined in the case of The King v. Reeks, (1), where, in a trial at bar on an information in the nature of a quo warranto, to prove the admission of the defendant a paper was produced, containing the admissions of the defendant and four other burgesses, which paper was stamped only with one stamp; it was then objected, on the part of the Court, that this paper having only a single stamp could not be admitted to be read in evidence; for the statute 9 & 10 W. 3. c. 25. s. 27. enacts, that a certain duty shall be paid for every piece of parchment or paper, upon which any admission into any corporation, &c. shall be written: and the 59th section enacts, that " if any instrument or writing, by that act intended to be stamped, shall, contrary to the intent thereof, be written or engrossed by any person whatsoever (not being a known officer, who in respect of any public office or employment shall be entitled to write the same,) upon parchment or paper not stamped according to that act, then there shall be paid over and above the duty for such instrument ten pounds; and that no such instrument shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity, until as well the said duty as ten pounds should be paid, &c. and a receipt produced for the same, &c.;" under this section of the act it was insisted, that the instrument in question, being an admission of five persons to be burgesses, ought to have five stamps; that it could not be good for any one of the five on account of the uncertainty, or at most it could be good only for one; if it was good for any, it must be for the first named; but the defendant was the third name, and therefore it could not be good for him. And of this opinion, as the report adds, was the whole Court, after argument. The counsel for the defendant then offered in evidence four other distinct pieces of parchment, bearing date on the day mentioned in the information, each of them being duly stamped, which imported the several admissions and swearings of the four burgesses last named in the other parchment, and

(1) 2 Ld. Raym. 1445. 2 Str. 716. S. C.

one of them imported the particular swearing and admission of the defendant. But the witness, who produced these pieces of parchment, proved that the entries were not made upon them, nor were any of them stamped, till near two months after the day on which they bore date; and, an objection being taken on this ground to the single instrument, which stated that the defendant alone was admitted and sworn, the Court was clearly of opinion, that it could not be admitted in evidence; for by the act the admission is to be on paper or parchment, stamped at the time; otherwise it is not to be given in evidence, till the penalty is paid, and certificate thereof produced.

In the case of the King v. Reeks, which has been just mentioned, the instrument first offered in evidence purported to contain the admissions of five burgesses, and it does not appear, that the single stamp, which was impressed, applied more to the defendant's name than to any of the others. This circumstance distinguishes that case from two others lately decided, Powell v. Edmunds (1), and Doe on the demise of Sir Joseph Copley v. Day (2), in which a paper containing contracts by several persons relative to different things, though stamped with a single stamp, was adjudged to be good evidence as to one of the contracting parties, because the stamp appeared to be applicable exclusively to his name. In the first case, the paper contained an agreement signed by the defendant for a lot of timber, and underneath a second agreement with another person for a different lot; this last had pencil marks drawn across it, as if for the purpose of striking it out; the stamp was affixed on that part of the paper on which the defendant's agreement was written, and below was the stamp officer's receipt for a penalty "for making the above agreement." An objection was taken on the ground of there being a single stamp, which was over-ruled at the trial, and afterwards by the Court of King's Bench. In the other

(1) 12 East, 6.

(2) 15 East, 241. See also Waddington v. Francis, 5 Esp. N. P.C. 182. Perry v. Bouchier, 4 Campb. 80.

case (1), the paper contained a variety of independent lettings of land between the landlord and a number of his tenants, one of whom was the defendant; the stamp was affixed opposite the defendant's name, and it appeared from the receipt of the stamp-officer, that the money for affixing it was paid after the commencement of the action, and only a short time before the trial; the instrument also appeared, when produced in evidence, to be cancelled with black-lead pencil marks as to every name except that of the defendant, and it was not proved that the instrument was not so cancelled at the time when the stamp was affixed. Under these circumstances, the Court held that the single stamp was intended to be applied to the contract with the defendant, and consequently that the paper was admissible. "If, indeed," said Lord Ellenborough C. J., "the instrument had been required to substantiate the several contracts with the different tenants, no doubt there should have been a stamp affixed to each, although the same terms of agreement applied to all; one stamp has been only held to be sufficient upon an instrument affecting the separate interests of several, where there has been a community of the same subject-matter as to all the parties. But here it sufficiently appears from the circumstances of the case, that the stamp was meant to be applied to the defendant's signature."

Alteration of bill of exchange or note.

When a stamped instrument has been once used for one purpose, it cannot be altered without a new stamp. If the parties have altered their original intention, and make a new instrument different from that which they originally contemplated, a new stamp will be necessary. (2) If a bill of exchange, for example, has been once effected, and has issued in a perfect form from the drawer to the acceptor, by whom it was returned with his acceptance to the drawer, it cannot be altered without being re-stamped. Thus, in the case of Bowman v. Nichol (3), where a bill of exchange had

(1) 13 East, 241. See also Waddington v. Francis, 5 Esp. N. P. C. 182.

(2) 15 East, 418.

(3) 5 T. R. 537. See also Master v. Miller, 4 T. R. 320. 2 H. Black. 141 S. C. Cardwell v. Martin, 1 Campb. 79.; 9 East, 190. S. C. Bathe v. Taylor, 15 East, 412. Walton v. Hastings, 4 Campb. 223. 1 Starkie, 215. S. C.

been drawn on a proper stamp, payable 21 days after date, and, while it continued in the hands of the drawer, was altered with the consent of the acceptor to be made payable 51 days after date, and was again altered to 21 days after date, subsequently to the time of becoming payable according to its original form; the Court of King's Bench held, that, at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; and that there ought to have been a new stamp. So, where a promissory note, payable by the defendant to the plaintiff or order (1), was originally expressed to be for value received, but, on the day after it had been signed and delivered by the defendant to the plaintiff, was with the consent of the parties altered by the addition of the words "for the good-will of a lease and trade," the Court held, that the alteration was a material one, because it was evidence of a fact, which, if necessary to be enquired into, must otherwise have been proved by different evidence, and also because it pointed out the particular consideration for the note, and put the holder upon enquiring, whether that consideration had passed; a new stamp was therefore necessary, for the want of which the note could not be received in evidence. The same rule is equally applicable to the case of an accommodation-bill. (2)

Alteration of policy of insurance.

It is provided by the 13th section of the stat. 35 G. 3. c. 63., relating to stamp-duties on sea-insurances, "that nothing in that act shall be construed to extend to prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten, or to require any additional stamp-duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration, originally paid or contracted for,

(1) Knill v. Williams, 10 East, 431.

(2) Calvert v. Roberts, 3 Campb. 343.

exceed the rate of 10 shillings per cent. on the sum insured, and so that the thing insured shall remain the property of the same persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by means of such alteration."

1. Alteration as to *time of sailing.*

In the case of Kensington v. Inglis (1), where the policy was "on goods and specie on board of ship or ships sailing between the 1st of October, 1799, and the 1st of June, 1800, being the property which should first sail to a certain amount, and upon the vessels carrying the goods," and a memorandum was written on the policy and subscribed by the defendant on the 11th of June, 1800, before any notice of the determination of the risk had been received, by which memorandum it was agreed to extend the time of sailing to the 1st of August following, the Court of King's Bench in this case held, that the memorandum did not require a stamp; for although the time of sailing was extended, yet no new subject of insurance was introduced by the memorandum, but the object insured continued the same.

2. Alteration as to *property insured.*

In another case (2), which occurred upon the same clause, where the policy was originally "on ship and *outfit*," from London to the South Seas, but after the sailing of the ship was altered by consent of the underwriters, and declared to be "on the ship and *goods*," instead of ship and *outfit*, the Court determined that as the *outfit*, originally insured, was essentially different from *goods* which were afterwards made the subject of insurance, the policy in its altered state required an additional stamp. The question is, said Lord Ellenborough C. J., in delivering the judgment of the Court, whether that part of the provision, which requires that

(1) 8 East, 273. Hubbard v. Jackson, 4 Taunt. 169. Ridsdale v. Shedden, 4 Campb. 107.

(2) Hill v. Patten, 8 East, 373. 1 Camp. 72. S. C. French v. Paten, 9 East. 351. Hubbard v. Jackson, 4 Taunt. 169. The cases on this subject are collected in Parke's Treatise on Insurances, p. 46. last ed.

"the thing insured shall remain the property of the same person," has been in this case complied with. The words, "the thing insured shall *remain* the property," appear properly to require and apply to *one* identical and continued subject-matter of insurance; such subject-matter *all along remaining* the property of the same proprietor, and to be ill-suited to a case like the present, where the thing last insured is not only in fact, but in name and kind, as a specific subject of insurance, essentially different from the thing first insured, and which begins also to have an existence at a different and much later period than the other, and when the thing first insured scarcely, or in a small degree only *remains* or continues to exist at all."

3. Alteration as to *warranty of seaworthiness.*

A memorandum indorsed upon a policy, waving the warranty of sea-worthiness, does not require a new stamp. (1) And Mr. Justice Bayley compared the case to that of a warranty to sail within a certain time, which may be altered by an unstamped memorandum, even after the period when the condition has terminated, without affecting the continuance of the policy.

Alteration without consent of all parties.

Where a policy has been executed in the common printed form, without any specific subject of insurance expressed in writing, and the subject-matter is afterwards inserted, the assured cannot recover against those underwriters, who have not signed the policy after the addition; for a material alteration is introduced with respect to such of the underwriters as have not assented. (2) It has been determined by several cases, that a material alteration in a material part of a policy of insurance, made by one of the parties interested, without the consent of all parties, destroys the policy as to those underwriters who have not assented to the alteration. (3) Even if all the parties assent to an alteration, and the alteration is such as to make the policy void for want of a new stamp, the policy

(1) Weir v. Aberdeen, 2 Barn. Ald. 325.

(2) Langhorn, v. Cologan, 4 Taunt. 330.

(3) Fairlie v. Christie, 7 Taunt. 416. 1 Holt, 331. S. C. Campbell v. Christie, 2 Starkie, 64.

cannot be enforced in its original form. (1) This is a general principle, and applies equally to bills of exchange, promissory notes, and other negotiable instruments.

Alteration by consent, to correct a mistake.

But where an alteration is made in an instrument with the consent of all parties in order to correct a mistake, and to make the instrument consistent with the original intention of the parties, there it has been held, that a fresh stamp is not necessary. Thus in the case of Kershaw v. Cox (2), where a bill had been drawn, payable to the defendant but not payable to order, the defendant, on the day after the bill was drawn, indorsed it over to the plaintiff, without adverting to the omission of the words "or order;" on the same day the plaintiff returned it to the defendant to get the omission rectified, and the drawer then inserted the words; here there was strong evidence to shew, that the omission was by mistake, for the bill was intended to be negotiable, and as such immediately indorsed, as if it had been drawn payable to order, and, as soon as the omission was discovered, it was rectified by the proper parties: the learned Judge, therefore, who tried the cause, left it to the jury to consider, whether the words afterwards added had been originally intended to have been inserted, but were omitted by mistake; and, the jury finding this to be the case, it was ruled, that a fresh stamp was not required. The point was afterwards brought before the Court of King's Bench, on a motion to enter a nonsuit, and the alteration was adjudged to be allowable under the stamp acts; having been made merely for the purpose of rectifying a mistake in drawing the bill contrary to the intention of the parties.

In another case, which occurs upon this subject, where an action was brought against the defendant as acceptor of a bill of exchange (3), it appeared that the defendant and another person, being indebted to the plaintiff, agreed to give him a

(1) French v. Patten, 9 East. 351.
(2) 3 Esp. N. P. C. 246. before Le Blanc J., cited 10 East, 435., and 15 East, 417. Jacobs v. Hart, 2 Starkie, 45. Robinson v. Touray, 1 Maule Selw. 217. Robinson v. Tobin, 1 Starkie, 336.
(3) Webber v. Maddocks, 3 Campb. 1.

bill of exchange, to be drawn by the one and accepted by the other (the defendant); instead of this they sent him a promissory note made by the one and indorsed by the other, which the plaintiff immediately returned, that it might be altered into a bill of exchange according to the agreement, and the alteration was accordingly made; an objection was taken, on the ground, that the instrument required a fresh stamp; but Lord Ellenborough C. J. ruled, that the stamp impressed was sufficient to render the instrument available, since it had not been negotiated as a promissory note, and the alteration might be treated as the correction of a mistake, according to the terms of the original agreement.

A person having drawn a bill payable to his own order, indorsed it to A., who indorsed it to B., and, the bill being dishonoured, paid the amount to B.; on which B. struck out his own indorsement and A.'s indorsement, and returned the bill to the drawer; the drawer then indorsed it, with the indorsements struck out, to the plaintiff, without a new stamp; the Court of King's Bench held, that the plaintiff was entitled to recover against the acceptor; the bill not having discharged its functions, when given to the plaintiff. (1) So, an alteration of the date (2), or of the time for which a bill has to run (3), made with the consent of the drawer and the acceptor, before the bill is negotiated, will not render a new stamp necessary; and it will be incumbent on the party, who sues upon the bill, to prove the time of making the alteration. Words written on a bill after its acceptance, not affecting the responsibility of the parties, will not vitiate the bill. (4) Nor is the validity of a bill affected by writing upon it the place where it is to be paid. (5)

The case of Cole v. Parkin (6) affords an instance of the rectification of a mistake in a bill of sale of a ship. The bill

(1) Callow v. Lawrence, 3 Maule & Selw. 95.

(2) Johnson v. D. of Marlborough, 2 Starkie, 313.

(3) Kennerly v. Nash, 1 Starkie, 452.

(4) Marson v. Petit, 1 Campb. 82. n.

(5) Trapp v. Spearman, 3 Esp. N. P. C. 57. Jacobs v. Hart, 2 Starkie, 45.

(6) Cole and others, Assignees of Doyle, v. Parkin, 12 East, 471.

sale, in reciting the certificate of registry, stated Guernsey as the port, where the certificate was granted, instead of Weymouth, and in this state was executed, but the mistake, being afterwards discovered, was rectified with the consent of all parties, and the deed delivered afresh; the question was, whether this second delivery made a new stamp necessary; Lord Ellenborough C. J., in delivering the judgment of the Court, referred to statute 26 G. 3. c. 60. s. 17., which enacts that a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry in words at length, shall be utterly null and void to all intents and purposes. "This bill of sale, therefore, when first executed, was, from the mistake in the recital of the certificate of registry, to all intents and purposes null and void; it took no effect whatever from its first delivery; and the stamp impressed upon it was wholly inoperative. This defect arose not from intention, but from mistake. The instrument, as first executed, was not what the parties meant to execute; and it was not in the state, in which it was at first intended to be, till it was altered. This is not the case of substituting a new and second contract, in the place of a preceding effectual one, upon a change of intention in the parties; but merely making the contract what it was originally intended to have been; and in such a case, where the instrument upon its first execution was void to all intents and purposes, where its insufficiency arose from a mere mistake, where in consequence of that mistake it was not in the state, in which it was intended to have been, when it was so executed, and where upon its second execution it is only put into that state which was originally intended, we think it is not going beyond the fair spirit of the stamp-laws to hold, that upon such second execution, being the first which was effectually operative, a new stamp was not requisite." So, the mistake of an agent, in declaring the interest in the margin of a policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. (1)

(1) Robinson v. Touray, 1 Maule & Selw. 217. Sawtell v. London, 5 Taunt. 359.

Written instruments have been admitted in evidence without a stamp in certain cases, where they were produced merely to prove something collateral, and not for the purpose of being enforced between the parties, and where it was not material to consider, whether the instruments were good or available in law. In the case of Holland q. t. v. Duffin (1), which was an action to recover several sums of money forfeited by insuring tickets in the lottery, contrary to the statute 22 G. 3. c. 47. s. 13., Lord Kenyon held, that an instrument, purporting to be a policy of insurance, might be given in evidence, though not stamped as a policy; for, such a contract is declared by the act to be illegal and void, and could not have been intended by the legislature as an object of taxation. And in an action of debt for bribery at an election under statute 2 G. 2. c. 24. s. 7., (2) Lord Ellenborough C. J. held, that an unstamped promissory note, payable to the defendant, which a witness said he had given for the re-payment of money received by him as a voter from the defendant (one of the candidates), might be admitted as evidence of the transaction, to corroborate the testimony of the witness. An unstamped receipt may be shewn to the witness as a memorandum, in order to refresh his recollection of a fact there stated. (3) The unstamped part of an agreement is admissible on the part of the plaintiff, as secondary evidence of the agreement, after proof of notice to the defendant to produce the stamped part, which is in his possession (4); and there can be no difference in this respect, whether the plaintiff has specially declared upon the agreement, or merely offers it as evidence in the course of the cause. So, in the case of a parish-settlement, although a general hiring cannot be presumed from the mere fact of service, where the service has been performed under written articles of agreement, which are not admissible in evidence for the want of a proper stamp, yet, where the question is, whether the service com-

Unstamped instrument, when evidence for collateral purposes.

(1) Peake, N. P. C. 57.

(2) Dover v. Maestaer, 5 Esp. N. P. C. 92.

(3) Rambert v. Cohen, 4 Esp. N. P. C. 213. Jacob v. Lindsay, 1 East, 460.

(4) Garnons v. Swift, 1 Taunt. 507. Waller v. Horsfall, 1 Campb. 501.

menced after the expiration of the articles, they may be inspected for the purpose of ascertaining, whether they would apply to the subsequent service. (1)

In an action for the non-delivery of goods, if the contract is proved by parol evidence, and it should appear that the parties made a contract on unstamped paper, the Court may inspect the instrument, to see whether it it applies to the goods, which are the subject of the action; and if they are not included in the contract, the parol evidence would be properly admitted. (2) So, a written agreement may be recovered in an action of trover, though unstamped (3); and, in such an action, it will not be necessary to give notice to the other party to produce the agreement. (4) So, in an action for money lent, where the plaintiff proved, that he had advanced the money to the defendant, who gave him a note for the amount on unstamped paper, and the defence was, that he had been induced to give the note in a state of intoxication, without having received any part of the money, Lord Ellenborough C. J. held, that the note might be inspected by the jury, as a contemporary writing, to prove or disprove the fraud imputed to the plaintiff. (5)

A paper, purporting to be a bill of exchange or promissory note, may be given in evidence, though unstamped, to support an indictment for forgery, or for uttering with a knowledge of the forgery (6); for, "the stamp acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law respecting it; the stamp is not, properly speaking, any part of the instrument, but merely a mark impressed on the paper, to denote the payment of a duty, and is collateral to the instrument itself: and as to the statute

(1) R. v. Pendleton, 15 East, 449. 455.
(2) 15 East, 455.
(3) Scott v. Jones, 4 Taunt. 865.
(4) Ib.
(5) Gregory v. Fraser, 3 Campb. 454.
(6) Hawkeswood's case, 1783., 1 Leach, Cr. C. 292., 2 East, P. C. 955. S. C. Lee's case, 1784, 1 Leach, Cr. C. 293. n. (*a*). Morton's case, 1795, 2 East, P. C. 955. Reculists' case, 1796, 2 Leach, Cr. C. 811. Davies's case, 1796, 2 East, P. C. 956. See Whitwell v. Dimsdale, Peake, N. P. C. 168.

enacting (1), "that no promissory note, bill of exchange, &c. not stamped as therein directed, shall be pleaded or given in evidence in any court, or admitted in any court to be good, or available in law or equity," the legislature thereby meant only to prevent their being given in evidence, when they were proceeded upon, to recover the value of the money thereby secured. It is certain that no holder of such an instrument as the present could, if it had been genuine, have founded an action upon it, and given it in evidence as a promissory note; but it is equally certain, that it might have been given in evidence on other occasions, as, for instance, if a person negotiating it were to be sued for the penalty inflicted upon the offence of negotiating such an instrument unstamped, there is no doubt, but that it might be given in evidence; and this instance shews most clearly, that it was properly received in evidence on the trial of this indictment, notwithstanding the seeming prohibitory words in the statute." (2)

In the case of The King v. Pooley (3), the prisoner was indicted under the statute 7 G. 3. c. 50. s. 1., which makes it a capital felony for any person, employed in receiving letters, to secrete any letter containing a bank note, or any warrant or draft, &c. for the payment of money. It appeared at the trial, that the draft contained in the letter, which the prisoner had secreted, was drawn above ten miles from the banking-house; the prisoner's counsel then objected, that, as the draft was on unstamped paper, it was not a valid order for the payment of money, and therefore not within the statute, on which the prisoner was indicted; and they founded this objection on the statute 31 G. 3. c. 25., the fourth section of which exempts from stamps only such orders for the payment of money, as are drawn on a banker residing within ten miles of the place where the order is made, and the nineteenth section provides that no bill, note, draft, &c. shall be pleaded or given in evidence in any court, or admitted in any court to be good, use-

(1) St. 31 G. 3. c. 25. s. 19.
(2) By Grose J. in delivering the opinion of the Judges in Reculists' case, 2 Leach, Cr. C. 813.
(3) 3 Bos. & Pull. 311.

ful, or available in law or equity, unless they are written on paper duly stamped. This point was reserved at the trial, and the case was afterwards argued before the Judges in the Exchequer-Chamber; when the objection taken on the part of the prisoner was, first, that which has been stated, namely, that the draft in question was not a draft for the payment of money, within the meaning of the stat. 7 G. 3. c. 50, s. 1.; and, secondly, that the indictment, which averred that the draft was in force at the time of the secreting, had not been proved, as from the want of a stamp the draft had never been available. The opinion of the Judges was not publicly declared: but the prisoner received a pardon for the offence charged in the indictment; and he was afterwards tried on the second section of the same act, which makes it a capital offence for any person to rob any mail of a letter or packet, or to steal or take any letter from any mail, or from any place for the receipt of letters, &c. (1) It was objected at the second trial, that the draft, before mentioned, being on unstamped paper, could not be received in evidence as a medium to shew that the prisoner had stolen the letter; but the Court over-ruled the objection, being of opinion, that the draft, though unstamped, might be admitted in evidence for collateral purposes, though not for the purpose of recovering the money mentioned in it, and the evidence was accordingly received. Here the paper was not offered in evidence, as it was on the former trial, as a draft for the payment of money, but merely as a paper contained in the letter, and the fact of the prisoner having this paper in his possession was evidence against him of his having stolen the letter, in which it was contained.

An objection, similar to that which was taken on the former trial in the last case, was again made in the case of The King v. Gillson. (2) The indictment was for feloniously setting fire to a certain house with intent to defraud an insurance company; at the trial, a policy of insurance was given

(1) 3 Bos. & Bull. 315. And this part of the case is reported in 1 East, Pl. C., addenda, xvii.

(2) 1 Taunt. 25.

in evidence on the part of the prosecution, by which the prisoner's goods, in a house there described, were insured against fire, and upon this policy a memorandum was indorsed, stating, that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum, in which last-mentioned house the prisoner was charged with having committed the felony; the policy was properly stamped, but the memorandum had no stamp; and the objection taken for the prisoner was, that in support of the charge it was essentially necessary to shew, that there subsisted a legally effective contract, and that, by the express provision of the stamp-acts, the memorandum in question not being stamped could not be given in evidence, or be good or available in any manner whatever; and a distinction was drawn between this case and that above-mentioned, where an unstamped forged instrument was admitted in evidence against the party charged with having forged it, or with uttering it knowing it to be forged. The point was reserved for the opinion of the Judges, and argued in the Exchequer-Chamber; and judgment was afterwards given at the Old Bailey, that the prisoner should be discharged.

Stamp presumed, when.

A regular stamp may be presumed in certain cases. If an agreement is in the possession of a party to the suit, who refuses to produce it after a notice, the other party may give in evidence a copy of the agreement, without proving that the original was duly stamped; the party, who has the original in his possession, may prove the negative. (1) If an instrument, which ought to be stamped, is proved to have been lost, parol evidence of its contents may be admitted without proof of the stamp being regular, where it can be presumed from the circumstances of the case that the instrument was duly stamped. (2) In the latest case upon this point, on a question of settlement between two parishes (3), it appeared that an indenture of apprenticeship, which had been regularly exe-

(1) Crisp v. Anderson, 1 Starkie, 35.

(2) R. v. East Knoyle, Burr. Set. Case, 151. 1 Bott. 547. S. C. R. v. Badby, 1 Bott, 549. S. P.

(3) R. v. Long Buckby, 7 East, 45.

cuted thirty years before, was delivered to the apprentice, at the end of the term, and lost; that a premium was paid with the apprentice; and further, that the parish in which he had served under the indenture had for many years treated him as one of their parishioners; on the other side it was proved by the deputy-register and comptroller of the apprentice duties, that it did not appear that such an indenture had been stamped with the premium stamp or enrolled, from the time of the date to the time of the trial of the appeal; but the Court of King's Bench were of opinion, that the Court below were right in presuming that the indenture had been properly stamped. "The question before the Justices," said Lord Ellenborough, "was, whether the presumption, that all was rightly done after the lapse of so many years, was sufficiently rebutted by the negative evidence of the officer; they thought not, and we cannot say that they have done wrong; for the presumption of law is to be favoured, and against the negative evidence they may have set the possibility of an irregularity in the returns made to the office."

Defect of stamp, how cured.

If an action cannot be brought upon an agreement until it is stamped, it must be stamped before the commencement of the action: but if it is an agreement which may be stamped on the payment of a penalty, then it may be stamped during the action. (1) In some cases the legislature has declared, that the paper cannot be stamped after it has been written, as in stat. 35 G. 3. c. 63. s. 14. concerning sea-insurances (2), and in stat. 31 G. 3. c. 25. s. 19. concerning bills of exchange, promissory notes, &c.* In other cases it is declared, that a

(1) 9 Ves. jun. 252. 11 Ves. jun. 595. R. v. Bp. of Chester, 8 Mod. 365. 1 Stra. 624. S. C.

(2) Roderick v. Hovil, 3 Campb. 103.

* Although the stamp-act of the 48 G. 3. c. 149. does not in express terms require, that the paper shall be stamped before the bill or note is written, yet as the 3d and 8th sections of this statute confirm and adopt all provisions and regulations relating to former duties, the clause in the 19th section of the 31 G. 3. is still in force. The 34th G. 3. c. 32., which authorizes the commissioners to stamp bills, &c. after they were drawn, on payment of a penalty, was only a temporary act, and has expired. See Bayley on Bills, p. 24.

penalty shall be incurred by writing on unstamped paper; and that the instrument shall not be available in evidence, until the duty and penalty are first paid, and a receipt for them produced, and until the instrument is marked with a proper stamp. (1) Here the defect may be cured by having a proper stamp affixed, which may be done by paying the duty, together with the penalty for not having the instrument stamped within the time limited. (2) In other cases the legislature only impose a penalty for not having the instrument duly stamped; and in these, though the party would be liable to a penalty, yet the paper may be given in evidence, though unstamped. (3) If the defendant has paid money into court in an action on a bill of exchange (4), or has by his plea admitted letters of administration, (of which the plaintiff, as administrator, made profert,) (5) he cannot object to the stamp as insufficient. The payment of money in the one case, and the plea in the other, admits the validity of the instrument.

Agreements, when to be stamped.

The stat. 48 G. 3. c. 149. (6), which regulates the present stamp duties, enacts that every agreement, minute or memorandum of agreement, (not particularly exempted,) that is made in England under-hand only, or made in Scotland without any clause of registration, is liable to a stamp in proportion to the number of words contained, when the subject-matter is of the value of 20l. or upwards, whether same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument.

A written paper, delivered by an auctioneer to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder,

(1) St. 5 & 6 W. & M. c. 21. s. 11. 12 Ann. st. 2. c. 9. s. 25. St. 37 G. 3. c. 136. s. 2. Hunt v. Stevens, 3 Taunt. 113.

(2) R. v. Bishop of Chester, 1 Stra. 624.

(3) R. v. Pearce, Peake, N. P. C 75.

(4) Israel v. Benjamin, 3 Campb. 40.

(5) Thynne v. Protheroe, 2 Maule & Selw. 553.

(6) See also St. 23 G. 3. c. 58. s. 3. St. 35 G. 3. c. 30. s. 1. 6. St. 37 G. 3. c. 90. s. 1. 6.

and the rent payable, is not such a minute of the agreement as requires a stamp, unless it is signed by some of the parties or by the auctioneer; nor is it such a writing as will exclude parol evidence (1); but if signed by the auctioneer, and delivered to the bidder, it ought to be stamped. (2) A contract of marriage may be proved by unstamped letters; the statute evidently applying to such matters only as are the subject of pecuniary calculation. (3)

An agreement is to be stamped in proportion to the number of words which it contains, not according to the number of items agreed upon. But if the parties add another item to an agreement which is already complete, and which has been executed between them, an additional stamp ought to be annexed to make such new item available. As, if two persons lay a wager, and write it down in the form of an agreement, which is stamped, and afterwards by another agreement, indorsed on the first, they consent that the bet shall be doubled; here there ought to be two agreement-stamps, or the party cannot recover on the last bet. (4) A written acknowledgment of the payment of money, stamped as a receipt, is evidence of the fact of payment, although there may be other writing on the same paper amounting to an agreement, provided this does not in any manner control or qualify the former part. (5)

A cognovit, being a mere acknowledgment of an account without any mutuality, does not require a stamp. But if there be any thing of agreement beyond the mere authority to enter a cognovit, then a stamp becomes necessary. Thus, where the defendant gave a cognovit to the plaintiff on unstamped paper, by which he agreed to confess, that the plaintiff

(1) Ramsbottom v. Tunbridge, 2 Maule & Selw. 434. Ingram v. Lea, 2 Campb. 521. Adams v. Fairbain, 2 Starkie, 277.

(2) Ramsbottom v. Mortley, 2 Maule & Selw. 445.

(3) Orford v. Cole, 2 Starkie, 351.

(4) Robson v. Hall, Peake, N.P.C. 127. Lord Kenyon is said to have been of opinion, that the plaintiff might recover on the *original* bet. But the plaintiff was nonsuited on another point.

(5) Grey v. Smith, 1 Campb. 387.

had sustained damage in the action to the amount of 30*l.*, on which no judgment was to be entered, unless the defendant made default in payment of the sum of 5*l.* by instalments, together with costs to be taxed, the Court held, that, in consequence of the terms which had been added, the paper in question amounted to an agreement; but that it was an agreement for less than 20*l.*, and therefore not liable to a stamp. (1)

Exemptions. The following particulars are exempted from stamp-duties imposed on agreements. (2)

Memorandum of insurance. 1. Any label or memorandum containing the heads of insurances to be made by the Royal Exchange Assurance and London Assurance.

Agreement for a lease. 2. Memorandum or agreement for granting a lease or tack, at rack-rent, of any land or tenement, under the yearly rent of 5*l.*

Whether a particular agreement is to be considered as a lease, (in which case it will require a lease-stamp,) or merely as an agreement for a lease, must depend entirely on the intention of the parties, as it is to be collected from the whole of the instrument. (3) If the words are that the one party *does* thereby demise, &c. or that the other party *shall* have, &c. and no other words appear to qualify the expression, they are to be construed as a lease. (4) And where the instrument appears to have been intended to transfer a present interest, or where it contains words of present demise, without any thing to shew that the parties had in contemplation a mere executory contract, the instrument will be considered as an actual lease, notwithstanding there may be a stipulation for executing a sub-

(1) Ames v. Hill, 2 Bos. & Pull. 150. Reardon v. Swaby, 4 East, 188. S. P.

(2) St. 48 G. 3. c. 149. See also St. 23 G. 3. c. 58. s. 3. St. 35 G. 3. c. 30. s. 1. 6. St. 37 G. 3. c. 90. s. 1. 6.

(3) Morgan v. Bissell, 3 Taunt. 65.

(4) Drake v. Munday, Cro. Car. 207. Maldon's case, Cro. El. 33. 5 T. R. 167.

sequent lease under seal. (1) If indeed the words do not import immediate possession, (as where it is agreed, that the party *shall* have and enjoy the land, &c.) such a stipulation would warrant the conclusion, that the instrument was intended, not as of itself a perfect lease, but as an agreement for a lease. (2)

Agreement for hire of servant.

3. Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant.

An agreement for the assignment of an apprentice from one master to another is not within the meaning of this clause; the term "hiring" not being applicable to an apprentice. (3) If such a written agreement is unstamped, it cannot be admitted in evidence, nor can parol evidence of the terms be received.

Agreement for sale of goods.

4. Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandize.

1, Meaning of the words, *for or relating to.*

Upon this clause it has been determined, that an agreement by the defendant to take a share of some goods, which had been bought by the plaintiff on their joint account, and to pay for them at a certain time, is an agreement *relating to* the sale of goods, and therefore exempted from a stamp duty (4); so also is an agreement by a broker to indemnify his principal, for whom he bought goods, from any loss on a re-sale (5); or a guarantee for the payment of goods, which a third person was about to purchase to a certain amount (6); or a receipt for the price of a horse containing a warranty of soundness (7); or an agreement to cancel a former agreement

(1) Harrington v. Wise. Cro. El. 486. Tisdale v. Sir W. Essex, Hob. 34. Baxter v. Brown, 2 Black. 973. Barry v. Nugent, cited 5 T. R. 165. 167. Poole v. Bentley, 2 Campb. 286. 12 East, 168. S. C. Tempest v. Rawling, 13 East, 18. Doe dem. Walker v. Groves, 15 East, 244.

(2) Doe dem. Jackson v. Ashburner, 5 T. R. 163. Coore v. Clare, 2 T. R. 739. Doe dem. Bromfield v. Smith, 6 East, 530.

(3) R. v. St. Paul's, Bedford, 6 T. R. 453. R. v. Ditchingham, 4 T. R. 769.

(4) Venning v. Leckie, 13 East, 7.

(5) Curry v. Edensor. 3 T. R. 524.

(6) Warrington v. Furbor, 8 East, 242. Watkins v. Vince, 2 Starkie, 369.

(7) Skrine v. Elmore, 2 Campb. 407.

respecting a sale of goods, and for the future sale of goods upon different terms. (1)

A letter from a principal to his factor, containing bills of exchange drawn upon the factor, and engaging to provide for the bills, if certain goods in the factor's hands, or about to be placed there, remained unsold when the bills should become due, is not within the exception of the act, and requires a stamp. (2) The Court held, that the description in the act is confined to instruments, which have the sale of goods for their *primary* object, and that the *primary* object of the letter in question was the obtaining of money upon a pledge of goods, intended to be placed in the factor's hands.

2. Sale of goods *to be made.*

An agreement for the making of machinery at a fixed price was considered, in the case of Buxton v. Bedall (3), to be not within the exemption; on the ground, that it is not a *contract for, or relating to, the sale* of goods, but relating to the *making* of goods, and for work and labour to be done. (3) The language of the exempting clause, "Memorandum or agreement for, or relating to, the sale of any goods, wares, or merchandise," is expressed in terms the most general and comprehensive; and, perhaps, on reconsideration, may be thought to extend to contracts relating to the sale of goods, which are to be made by the seller before their delivery, no less than to contracts for the sale of goods already made. It may be observed further, that the true principle and ground of decision in the case of Towers v. Sir J. Osborne, (on the authority of which the case of Buxton v. Bedall was determined,) does not appear to be inconsistent with such a construction. The Court of King's Bench there held, that a contract for a chariot, which a person had bespoke, was not a contract for the purchase of goods, but for the making of something not in

(1) Whitworth v. Crockett, 2 Stark. 431.

(2) Smith v. Cator, 2 Barn. Ald. 778.

(3) 3 East, 303. on shewing cause against a new trial. The only Judges present were Mr. Justice Lawrence, and Mr. Justice Grose; and they determined the point on the authority of Towers v. Sir J. Osborne, a case on the statute of frauds. See this case stated, in Ch. 8. Sect. 1

existence, and therefore not within the 17th section of the statute of frauds; for that section speaks of acceptance of part of the goods as one of the requisites to bind the bargain, and is supposed therefore not to extend to those cases, in which the subject-matter of the contract is incapable of delivery and of part-acceptance. (1) But in the excepting clause of the stamp-act, nothing is said relative to the delivery of the goods, nor is there any reason for supposing that the legislature intended to make a distinction, with respect to stamping, between contracts for the sale of goods ordered to be made, and contracts for such as are already made. It constantly happens, that the subject-matter is not at the time of the contract in the state in which it is to be delivered; in some cases more is to be done, than in others; but still the contract appears to relate to the sale of goods, although the goods may not be at the time of the purchase in a complete state for delivery. And this is the construction, which the Court of Common Pleas has put upon the clause in question, in the late case of Wilks v. Atkinson (2), in which it was determined, that a contract for the purchase of a quantity of linseed oil was not liable to a stamp, although the oil had not been made, but was to be prepared out of raw materials in the seller's possession.

3. Sale of growing crops.

An agreement for the sale of crops growing on certain lands, to be delivered afterwards, has been determined to be an agreement for an interest in land, and is therefore not exempted as a sale for goods. (3) In the case of Waddington v. Bristow, Mr. Justice Chambre said, " Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods at the time of the contract made, yet I cannot think the present agreement within the exemption,

(1) See Groves v. Buck, 3 Maule & Selw. 179.

(2) 6 Taunt. 11. 1 Marshall, 412. And see the opinions of Lord Alvanley C. J. and Chambre J. in Waddington v. Bristow, 2 Bos. & Pul. 454.

(3) Waddington v. Bristow, 2 Bos. & Pull. 453. Crosby v. Wadsworth, 6 East, 602. Emmerson v. Heelis, 2 Taunt. 38.

since it gives an interest to the vendee in the produce of the vendor's land." But where the owner of a close, cropped with potatoes, agreed to sell them at a certain rate, and the purchaser was to take them up immediately, the Court of King's Bench held, that this agreement was not for any interest in the land (1); and the distinction, taken between this and the two cases just mentioned, was, that there the contracts were for the growing crops of hops and grass, (and therefore the purchasers of the crops had an immediate interest in the land, while the crops were growing to maturity,) but here the land was to be considered as a mere warehouse for the potatoes, till the purchasers could remove them, which was to be done immediately. So, where the agreement was to sell all the potatoes growing on a certain piece of land of the defendant, and the plaintiff to dig them up and carry them away, the Court held, that the contract was confined to the sale of the potatoes as mere chattels, and that nothing else was in the contemplation of the parties. (2)

5. Memorandum or agreement made between the master and mariners of any ship or vessel for wages, on any voyage coastwise from port to port in Great Britain.

Agreement for seaman's wages.

6. Letters containing any agreement (not before exempted) in respect of any merchandise, or evidence of such an agreement, which shall pass by the post, between merchants and other persons carrying on trade or commerce in Great Britain, and residing and actually being at the time of sending such letters at the distance of 50 miles from each other. (3)

Letter containing agreement.

A letter written by one, who managed another person's trade, to a creditor, promising to pay a debt which arose in the regular course, has been held to come within the letter and spirit of this exemption. (4)

(1) Parker v. Staniland, 11 East, 362.

(2) Warwick v. Bruce, 2 Maule & Selw. 205.

(3) Leigh v. Banner, 1 Esp. N. P. C. 403. Stat. 32 G. 3. c. 51.

(4) M'Kenzie v. Banks, 5 T. R. 176.

CHAP. X.

Of the Admissibility of Parol Evidence to explain, vary, or discharge Written Instruments.

THE order, in which it is proposed to treat of this intricate and extensive subject, is, First, to consider in what cases parol evidence is admissible to explain ambiguities in written instruments; Secondly, whether parol evidence is admissible to add to, vary, or discharge written instruments; and, Thirdly, to consider the rule of evidence on this subject, established in courts of equity.

SECT. I.

Of the Admissibility of Parol Evidence to explain Ambiguities.

THE first section treats of ambiguities, latent and patent, and of the admissibility of evidence of usage as explanatory of ancient grants and deeds.

Ambiguities.

There are two sorts of ambiguities of words, says Lord Bacon (1); the one is called *ambiguitas latens,* the other *ambiguitas patens.* The first occurs, where the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument; the latter kind is such as appears on the face of the instrument itself.

Latent ambiguity.

First, with respect to latent ambiguities.

A latent ambiguity, which is raised by extrinsic evidence, may be explained in the same manner. Thus, if a person grant his manor of S. to one and his heirs, so far there appears to be no ambiguity; but if it should be proved, that the grantor has the manors both of South S. and North S.,

(1) Bac. Elem. rule 23. The subject of this chapter has been treated of, by Mr. Roberts in his Treatise on the Statute of Frauds, and by Mr. Sugden in his Law of Vendors and Purchasers.

this ambiguity is matter in fact, and parol evidence may be admitted to shew, which of the two manors the party intended to convey. (1) So, it was resolved in Lord Cheyney's case (2), if a person has two sons both baptized by the name of John, and conceiving that the elder, who had been long absent, is dead, devises his land by his will in writing to his son generally, and in truth the elder is living, in this case the younger son may in pleading or in evidence allege the devise to him, and if it is denied he may produce witnesses to prove his father's intent, that he thought the other was dead; or, that at the time of making his will, he named his son John the younger, and the writer left out the addition. No inconvenience, adds Lord Coke, can arise, if an averment be taken in such a case; for he who sees the will, by which land is so devised, cannot be deceived by any secret averment: when he sees the devise to the testator's son John generally, he ought at his peril to enquire which son the testator intended, which may easily be known by him, who wrote the will, and by others who were privy to the intent; and, if no direct proof can be made of his intent, there the devise is void for its uncertainty.

Mistake in name.

When a devise in a will is to a person, designated by a christian and surname without any other description, and no such person appears to claim the legacy or to have been known by the testator, parol evidence may be admitted to shew, that both the names have been mistaken by the person, who took the instructions for the will; as, in the case of Beaumont v. Fell (3), where a legacy was bequeathed to Catharine Earnley, and the name of the person who claimed the legacy was Gertrude Yardley, the Court established the claim, observing how very material it was, that no such person as Catharine Earnley claimed under the will. Here, there was no ambiguity on the face of the will, but the latent

(1) Bac. Elem. rule 23.

(2) 5 Rep. 68. b. See Also Altham's case, 8 Rep. 155. Hob. 32. Jones v. Newman. 1 Blackst. 60. Harris v. Bp. of Lincoln, 2 P. Wms. 136. Careless v. Careless, 1 Merivale, 384.

(3) 2 P. Wms. 140. See also Dowset v. Sweet, Ambl. 175. Bradwin v. Harpur, Ambl. 374. Parsons v Parsons, 1 Ves. jun. 266. 3 Ves. 322. Smith v. Concy, 6 Ves. 42. Doe dem. Cook v. Danvers, 7 East, 303.

ambiguity was introduced by extrinsic evidence, and the same kind of evidence also shewed, that there was a person of the name of Gertrude whom the testator called Gatty, which name the person who drew the will mistook for Katy; in this case, therefore, as parol evidence was admitted to shew the latent ambiguity, parol evidence was also admitted to explain it. So, where the testator bequeathed his stock in a particular fund, and it appeared, that he had not at the time of making his will or afterwards any stock in that fund, having sold out some time before and purchased into another fund, evidence was admitted to shew whence the mistake arose, and the legacy was satisfied out of the new fund, into which the testator had purchased. (1) So, where the devise was "of *all* my farm and lands called Trogues-farm, now *in the occupation of A. C.*," the Court of King's Bench were clearly of opinion, that two closes *in the occupation of L. M.*, but forming a part of Trogues-farm, would pass under the devise; and that a written notice from the testator to L. M. had been properly admitted in evidence, to shew that he considered them as parcel of his farm called Trogues-farm. (2) Here the devise was sufficiently comprehensive to include the whole of the lands, and ought not to be narrowed by the defective description of the occupation.

Parol evidence, to give effect to a will, when admissible.

In the instances, which have been just mentioned, it is to be observed, that, unless the evidence had been admitted, the will could not have taken effect. In the first case, no person was to be found corresponding with the description in the devise; in the second, the testator had no property in the funds, out of which he appointed the legacy to be paid; and in the third, if the closes in question were not to be included as part of the devised farm, the word "all" in the devise would not be satisfied. And the question on the admissibility of parol evidence in such cases will depend principally upon this, namely, whether the evidence is necessary to give an effective

(1) Selwood v. Mildmay, 3 Ves. jun. 306. See 4 Ves. 676. 1 Bro. Ch. C. 472. Andrews v. Dobson, 1 Cox, Ch. C. 425.

(2) Goodtitle dem. Radford v. Southern, 1 Maule & Selw. 299. Doe dem. Beach v. Lord Jersey, 1 Barn. Ald. 550. Doe dem. Harris v. Greathed, 8 East. 103.

operation to the devise, or whether, without that evidence, there appears to be sufficient to satisfy the terms of the devise and the intention of the testator as expressed on the face of the will. If the testator has left property which corresponds with the description in the will, extrinsic evidence is not admissible to shew, that he intended to include other property not within that description. (1)

Examples. 1. With reference to the *estate*.

In the case of Whitbread v. May (2), where the testator, having devised all his estates in trust for his son for life with remainder over in strict settlement, &c., by a codicil afterwards revoked his will "so far as it related to *his estate at* Lushill, in the county of Wilts, and *Hearne* and Buckland, in the county of Kent, which he devised to his son in fee," it appeared, that at the time of the devise the testator had lands in the parish of *Hearne* and in several other parishes, all which he had purchased by one con tract from one person; evidence was then offered to shew that the testator, by the description of his "*estate at Hearne*," meant to designate and include not only the lands in that parish, but also all the other lands which he had purchased at the same time. This evidence was received at the trial, subject to the opinion of the Court above; and the Court of Common Pleas were afterwards equally divided in opinion on the question of its admissibility.

In a much later case, however, the case of Doe on the demise of Sir A. Chichester v. Oxenden (3), which was very similar to the last, the Court of Common Pleas adjudged such evidence to be inadmissible. The question there was, whether on a devise of the testator's "*estate of Ashton*," parol evidence could be admitted to shew, that the testator intended by that description to devise all his maternal estate, which consisted of two manors in the parish of Ashton and another manor in the adjoining parish; the Court of Common Pleas, after

(1) Doe dem. Brown v. Brown, 11 East, 441. Doe v. Oxenden, 3 Taunt. 147. Doe dem. Tyrrell v. Lyford, 4 Maule & Selw. 550. Tytler v. Dalrymple, 2 Merivale, 419.

(2) 2 Bos. & Pull. 593.

(3) 3 Taunt. 147. Doe dem. Browne v. Greening, 3 Maule & Selw. 171. Beaumont v. Field, 1 Barn. Ald. 247.

hearing two arguments, determined against its admissibility. The Chief Justice, Sir James Mansfield, in delivering the judgment of the Court, after premising that he had felt considerable doubts on the subject in consequence of the case of Whitbread v. May, in which case the Court was equally divided on the admissibility of parol evidence, adverted to the case of Beaumont v. Fell (1), and to the similar case of Dowset v. Sweet (2), and observed on these cases, that although it was not expressly stated to have been necessary to receive the evidence in order to give effect to the will, yet that ground of determination might be inferred. "It will be found," said the Chief Justice, "that the will would have had no operation unless the evidence had been received. But, in the case now before the Court, the will has an effective operation without the evidence proposed; every thing will pass under it, that is in the manor or parish, or what he would naturally call his Ashton estate. This will be an effective operation; and, this being so, the case in this respect differs from all the others; because in them the evidence was admitted to explain that, which without such explanation could have had no operation. It is safer not to go beyond this line. Only those premises, therefore, will pass under the devise, which are in the manor or parish of Ashton."

Soon after this decision of the Court of Common Pleas, the devisee brought an action of ejectment against the heir at law, and offered at the trial the evidence before-mentioned; on the rejection of which, a bill of exceptions was tendered; and the case was brought up to the House of Lords on a writ of error. (3) The question on the admissibility of the evidence was referred to the Judges; and Lord Chief Justice Gibbs delivered their unanimous opinion, that the evidence ought not to be admitted. "The courts of law," said the Chief Justice, "have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is

(1) Vid. supr. 567.
(2) Ibid.
(3) Doe dem. Oxenden v. Sir A. Chichester, 4 Dow. 65.

introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to shew which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to shew which of them the testator intended. And so, also, if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to shew which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a case that extrinsic evidence can be received. It is of great importance, that the admission of such extrinsic evidence should be avoided, where it can be done, that a purchaser or an heir at law may be able to judge from the instrument itself, what lands are or are not affected by it. Here the devise is of all the devisor's estate at Ashton, (for there is no difference between the words "estate of Ashton" and "estate at Ashton,") and he has an estate at Ashton which satisfies the description. It is true he has other lands which come to him along with his estate of Ashton; but they are not therefore comprised in the words "my estate of Ashton." If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence, that his intention was to devise lands out of these counties; and for the same reason, when the testator here describes the lands as his estate of Ashton, you cannot receive extrinsic evidence to extend this to other lands not of Ashton."

2. With reference to the *devisee.*

In the case of Thomas v. Thomas (1), where the testator had devised to his grand-daughter Mary Thomas of Llechlloyd in Merthyr parish, it appeared, that at the time of his

(1) 6 T. R. 671. And see Lord Walpole v. Ld. Cholmondeley, 7 T. R. 138.

death he had a grand-daughter of the name of Elinor Evans, one of the lessors of the plaintiff, who lived in the place and parish named in the will, and also a great grand-daughter, Mary Thomas, the defendant, the only person of that name in the family, but who lived in another place, and had never been in Merthyr parish; the plaintiff's counsel at the trial offered parol evidence to shew, that the person, who drew the will, had made a mistake in the name of the devisee; and Mr. Justice Lawrence received the evidence (1), subject to the opinion of the Court above on its admissibility: but as the jury were of opinion, that the name had not been inserted by mistake, and therefore found for the defendant on the first count, which laid the demise from Elinor Evans, the admissibility of this evidence did not afterwards form any part of the argument. After this finding of the jury, the question was between Mary Thomas and the plaintiff on a demise from the heir at law, and in this stage of the cause the defendant's counsel offered evidence of declarations made by the devisor previous to the making of his will, expressive of his regard for the plaintiff, and of his intention of giving her the premises in dispute. But this evidence was rejected, on the ground, that nothing dehors the will could be received to shew the intention of the testator, which could only be collected from the words of the will itself, after the removal of any latent ambiguity in the description of persons or other terms in the will. And this opinion was afterwards affirmed by the Court of King's Bench. "If there had been no person," said Lord Kenyon, "to answer the description of grand-daughter, living at Llechlloyd in Merthyr parish, I should have rejected the description, and have said, that the devise applied to Mary Thomas: but it appears, that there is another person answering that part of the description, who is also in another part of the will an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas, who is named in this clause of the will, we are left to conjecture, who was meant by the devisor; but the law will not allow an heir at law to be disinherited by conjecture.

(1) See 8 Vin. Ab. 512. pl. 29.; cited by Lawrence J., 6 T.R. 674 and Hampshire v. Pierce, 2 Ves. 216.

And with regard to the other question respecting the rejection of evidence," added Lord Kenyon, "it was properly rejected; the supposed declarations having been made by the testator, long before the will was made: but, had they been made at the time of making the will, I should have thought them admissible evidence."

Secondly, with respect to patent ambiguities.

Patent ambiguity.

If a clause in a deed, or will, or any other instrument, is so ambiguously or defectively expressed, that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party, evidence of the declaration of the party cannot be admitted to explain his intention; but the clause will be void on account of its uncertainty. In many cases an apparent uncertainty may be removed by collecting the general intention from other passages in the writing, so as to make the whole consistent; or by a reference to some event, or some other writing, or some medium of explanation, adverted to in the instrument. But when, after comparing the several parts of a written instrument, and collecting all the lights which the writing itself supplies, the intention of the parties still appears to be uncertain, parol evidence of their intention is not admissible. "Ambiguitas patens," says Lord Bacon (1), (that is, an ambiguity apparent on the deed or instrument,) "cannot be helped by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law: for that were to make all deeds hollow, and subject to averment, and so in effect to make that pass without deed, which, the law appoints, shall not pass but by deed. It holds generally," he adds, "that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty."

Uncertainty in devise.

And in the case of a will, if any devise is expressed doubt-

(1) Bac. Elem. rule 23. Doe dem. Tyrrell v. Lyford, 4 Maule & Selw. 550. Lord Cholmondeley v. Lord Clinton, 2 Merivale, 343.

fully and with uncertainty, the only construction, which it is capable of receiving, is by comparing it with the other parts of the will; the declarations of the testator are not admissible to remove the apparent ambiguity, or to explain his intention. As, for example, if the devise is to "one of the sons of J. S.," who has several sons, such an uncertainty in the description of the devisee cannot be explained by parol proof. (1) So in a case, where the testator made dispositions in his will to several persons, among others to his wife and niece, who were the only women mentioned in the will, and then devised "to her" a particular estate for life, the question was whether parol evidence could be admitted, to shew which of the two was intended: the Lord Chancellor refused to receive it, on the ground that it would tend to put it in the power of witnesses to make wills for testators; the Court held, that though the term "her" was relative, it was to be referred in this case to the wife, because in other parts of the will it seemed to relate to the wife; but expressly excluded the parol evidence offered to explain the will. (2) However, courts of law as well as courts of equity will admit evidence of the situation and circumstances of the parties, for the purpose of assisting them in putting a construction on wills, that are not clearly expressed; as, in the case of Masters v. Masters (3), where the testator, after having bequeathed a legacy to the poor of two hospitals in Canterbury, (naming them,) bequeathed another sum in his codicil "to all and every the hospitals," the second bequest was adjudged not to be void for uncertainty, but to have been intended for all the hospitals in Canterbury, as it appeared in evidence that the testator lived in Canterbury, and had in his will taken notice of two hospitals there. But evidence of the value of the estate devised, or of the amount of the testator's property, will not be admitted in order to raise an argument in favour of a particular construction; whatever may be the amount, the general rule of construction must prevail. (4)

(1) 2 Vern. 624.

(2) Castleton v. Turner; cited 2 Ves. 217.

(3) 1 P. Wms. 420. See also Harris v. Bishop of Lincoln, 2 P. Wms. 135. Sir J. Eden v. Earl of Bute, 3 Bro. Parl. C. 79. Doe v. Burt, 1 T. R. 701. Selwood v. Mildmay, 3 Ves. jun. 310. 6 Ves. 396. 13 Ves. 174. 15 Ves. 514. Herbert v. Reid, 16 Ves. 481.

(4) Doe dem. Handson v. Fyldes, Cowp. 833. Standen v. Standen,

A blank in a will for the devisee's name is an instance of apparent ambiguity, and parol evidence cannot be admitted to shew what person's name the testator intended to insert. (1) But on a bequest to a person, whose surname was mentioned with a blank left for the Christian name, the party who claimed the legacy was allowed, not only to prove acts of kindness and constant affection on the part of the deceased, but to shew further that the testator had said, "he would provide for him, and that he had left him something by his will." (2) And in another case, where only one initial appeared in the will, the bequest being "to Mrs. G." without any other description, the Chancellor referred it to the master to receive evidence, to shew who was the person intended to be described by that initial. (3) The distinction between these cases is, that in the former there is no description whatever of a devisee, and whether the testator had selected any person as the object of his devise is entirely uncertain on the face of the will; but in the two last cases, the testator has given some description, and though it would appear too slight and general for the information of strangers, yet to persons well acquainted with the testator, it might be sufficiently full and distinct: in the first of these two cases, the testator might not have known the Christian name; in the other, the description in the will might have been the only one, by which the testator used to designate the claimant.

Omission of name in will.

When a blank is left in a written agreement, which need not have been reduced into writing, and would have been equally binding, whether written or unwritten, (as if the agreement were to deliver goods to the amount of less than ten pounds, and a blank were left for the quantity of goods to be delivered,) in such a case, it is presumed, in an action

Omission in written instruments.

2 Ves. jun. 595. Richardson v. Edmonds, 7 T. R. 640. Doe v. Dring, 2 Maule & Selw. 455. Bootle v. Blundell, 1 Merivale, 216. Jones v. Tucker, 2 Merivale, 537. Attorney General v. Grote, 3 Merivale, 316.

(1) Baylis v. The Attorney-General, 2 Atk. 239. Castledon v. Turner, 3 Atk. 257. Hunt v. Hort, 3 Bro. Ch. C. 311.

(2) Price v. Page, 4 Ves. 680.

(3) Abbott v. Massie, 3 Ves. 148.

for the non-performance of the contract, parol evidence might be admitted to shew the quantity, for which the parties agreed: for a memorandum in writing was not required in this case by the statute of frauds, and the proposed evidence would not contradict any part of the written agreement, but merely supply an omission, where nothing need have been expressed. And where a written instrument, which was made professedly to record a fact, is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof. Thus, if a bishop's register were to be produced in evidence, for the purpose of shewing a presentation by a patron, under whom the plaintiff claims, and on the production of the register a blank should appear in the place where the patron's name is usually inserted, the presentation might be proved in some other way (1); as by a witness, who was present, and heard the presentation. So, in the case of a surrender of a copyhold by a steward, if there is any mistake in the entry, that is only matter of fact, and the courts of law will in that case admit an averment, that there was a mistake either as to the lands or uses. (2)

Usage to explain ancient charters, grants, &c.

Thirdly, as to the admissibility of evidence of usage, to explain ancient charters and grants.

In the construction of written instruments, words are to be understood according to their common and general acceptation at the time when the instrument was made (3), and with reference to the nature of the subject. If the language in ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to for the purpose of explanation (4), though it can never be admitted to

(1) Bishop of Meath v. Lord Belfield, 1 Wils. 215.

(2) Towers v. Moor, 2 Vern. 98.

(3) Vaugh. Rep. 169. Com. Dig. tit. Parols, (A).

(4) R. v. Varlo. Cowp. 248. Gape v. Handley, 3 T. R. 288. n. R. v. Bellringer, 4 T. R. 810. R. v. Osbourne, 4 East, 333. Bailiff, &c. of Tewkesbury v. Bricknell, 2 Taunt. 120. R. v. Mayor of St. Alban's, 12 East, 559. R. v. Mayor, &c. of Stratford-upon-Avon, 14 East, 348. R. v. Mayor, &c. of Chester, 1 Maule & Selw. 101. Mayor of London v. Long, 1 Campb. 22.

control or contradict the express provisions of the instrument. Such continued usage is a strong practical exposition of the meaning of the parties. Even in the case of an act of parliament, universal usage has been referred to as a proper expositor, where the language is doubtful. (1) Lord Coke, in commenting on the statute of Gloucester, says, that when any claimed before the justices in eyre any franchises by ancient charter, if the words were general, and a continual possession was pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading expounded them to the court, and averred continual possession according to that exposition, the entry was ever, *inquiratur super possessionem et usum*; "and this, adds Lord Coke, I have observed in divers records of those eyres, agreeably to that old rule, *optimus interpres rerum usus*." (2) And the uniform course of modern authorities fully establishes the rule, that, however general the words of ancient grants may be, they are to be construed by evidence of the manner in which the thing has been always possessed and used. (3) Thus, on an information to set aside an election to a perpetual curacy, it appeared that the impropriate rectory, out of which the curacy arose, had been granted in trust for the use of the parishioners and inhabitants of a parish for ever; on the part of the relators it was insisted, that the right of nomination to the vicarage ought to be confined to inhabitants paying scot and lot, or to persons paying to church and poor; and on the part of the defendants, that it extended to all house-keepers in general: Lord Hardwicke, in delivering his judgment, said, "that some sort of limitation was allowed by both sides to have been put by usage on the liberality of the grant, and that in the construction of ancient grants and deeds there is no better way of construing them, than by usage; and *contemporanea expositio* is the best way to go by;" and since in this case there

(1) Sheppard v. Gosnold, Vaugh. 169, and see R. v. Scott, 3 T. R. 604.

(2) 2 Inst. 282.

(3) Weld v. Hornby, 7 East, 199. R. v. Osbourne, 4 East, 327.

was evidence of house-keepers having constantly voted, Lord Hardwicke held, that this usage ought to prevail (1)

Nor does it make any difference with respect to the admissibility of evidence of immemorial usage, for the purpose of explaining and construing ancient instruments, whether the instrument be a charter granted by the crown, or merely a private deed. Thus, in the case of Withnell v. Gartham (2), where the question was on the construction of an ancient deed, granting to the minister and churchwardens of a parish the power of appointing a schoolmaster, whether all the churchwardens must concur, or whether the act of the majority was sufficient, and the jury found the usage to be in favour of the appointment by a majority, Lord Kenyon, in speaking of the usage and adverting to an argument which had been insisted on, (namely, that the Court ought to reject the evidence of usage, because the instances proved were not as ancient as the deed, and also because usage cannot be let in to explain a private deed,) said, that if the first reason were sufficient to reject the usage, it would be difficult to know how far such an objection might extend. In many cases a party undertakes to prove a custom from the time of legal memory, but that proof is generally established by evidence of facts done at a much later period. And as to the second objection, Lord Kenyon said, there was no difference in that respect between a private deed and a king's charter; in both cases evidence of usage might be given to expound them.

Thus also, in a late case (3), in an action for entering the plaintiff's close, where the defendant pleaded, that the close was copyhold, and justified under a grant from the lord and by the command of the copyholder, in support of this plea the defendant proved that the person, under whom

(1) The Attorney-General v. Parker and others, 3 Atk. 576. The Attorney-General v. Forster 10 Ves. 335.

(2) 6 T. R. 388.

(3) Stammers v. Dixon, 7 East, 200 Wadley v. Bayliss, 5 Taunt. 752. Lord Petre v. Blencoe, 4 Gwill. 1484

he justified, and all those whose estate he had, for a long course of years had constantly taken the forecrop of grass and pasturage from the close, and then by court rolls of the manor proved admissions to a copyhold tenement "of three acres of meadow," (which was admitted to be the close in question,) but every other benefit of the land, except the forecrop, had been enjoyed by those from whom the plaintiff claimed; Mr. Justice Heath, who tried the cause, was of opinion, "that, although the terms of the surrender and admission were sufficiently comprehensive to pass the soil and freehold, yet, as in ancient grants the legal import might be restrained by long and concomitant usage, which might be taken as evidence of the original intent of the parties in making the grant, so here the grant might be restrained by the received usage, and only pass the forecrop, which would not carry the soil." And the Court of King's Bench agreed in this construction of the written evidence. The terms of the admissions, they thought, were not incompatible with the plaintiff's right, and might receive a construction conformable to the usage.

Thus it appears, that the words of an instrument, in themselves conveying a general right to an estate, may in certain cases be limited and restrained by the manner in which the estate has for a length of time been actually enjoyed. But in the construction of a legal instrument, where the question is, whether a party is bound by his covenant to do a certain act, (as, for example, to grant a renewal of a lease,) courts of law will not consider the acts of the parties or their interpretation of the instrument. In one case, indeed, where it was doubtful, whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively, the Court of King's Bench held, that the legal effect was a perpetual renewal, on the ground that the parties themselves had, by their own acts, put a construction on the covenant, and that the Court could not say the contrary. (1) But this case has been frequently disapproved

(1) Cooke v. Booth, Cowp. 819.

of(1), and a different rule is now established. "It cannot be a legal mode of construction, (said the Master of the Rolls, in a case of this kind,) that a party who has done an act, which he was not bound to do, or from a mistake, should therefore be bound for ever without the power of retracting." (2)

SECT. II.

Of the Admissibility of Parol Evidence to vary or discharge Written Instruments.

General rule. IT is a general rule of law, that parol evidence cannot be admitted to contradict, add to, or vary the terms of a will, deed, or other written instrument. First, with respect to wills;

Wills. The statutes of the 32d and 34th of Henry VIII., which gave the power of devising lands by a last will and testament in writing, must clearly have intended, that whatever is effectual and to the purpose, ought to be in writing and sufficient without the aid of words not written; and therefore no parol evidence of the testator's intention can be admitted to control or enlarge the terms of the will. (3) An additional reason for this rule is supplied by the statute of frauds, which enacts, that all devises of lands, &c. must be in writing, and are not revocable except by some other will or codicil, or by some act as cancelling, &c. And with regard to wills of personal property, it is evident from the 22d section of the statute of frauds, that no unwritten declarations of the testator can be admitted to vary any bequest; for that section enacts, "that no will in writing concerning goods, chattels,

(1) Baynham v. Guy's Hospital, 3 Ves. 498. Eaton v Lyon, 3 Ves. 694. Iggulden v. May, 9 Ves. 333. 2 Bos. & Pull., New Rep. 452. S. C.

(2) Moore v. Foley, 6 Ves. 238.

(3) Brett v. Rigden, Plowd. Com. 345. Lord Cheyney's case, 5 Rep. 68. Bertie v. Lord Falkland, 1 Salk. 231. 2 Vern. 333. S. C.

or personal estate, shall be repealed, and that no clause shall be altered or changed, by any words or will by word of mouth only, except the same be in the life-time of the testator committed to writing, and after the writing read to the testator, and allowed by him, and proved to be so done by at least three witnesses." (1)

Parol evidence is not admissible to contradict, or vary, or add to, the terms of a deed. (2) "It would be inconvenient," says Lord Coke, "that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such nude averments against matter in writing should be admitted." In an action of debt therefore on a bond conditioned to pay a sum of money on a certain day, the defendant cannot shew that the bond was intended as an indemnity against another bond. (3) **Deeds.**

In an action on a bond a party will not be permitted to shew a condition different from that expressed in the bond; and a conveyance cannot be averred by parol to be to another use or intent than that expressed in the conveyance. But there is a difference in this respect between an use and a consideration. It is an established rule, that a party may aver another consideration, which is consistent with the consideration expressed; but no averment can be made contrary to, or inconsistent with, that expressed in the deed. (4) Thus, if a deed of bargain and sale is expressed generally to be made "for divers good considerations," it may be 1. Proof of another consideration.

(1) Brown v. Selwin, Forrest. 240. Lowfield v. Stoneham, 2 Stra. 1261. Cambridge v. Rous, 8 Ves. 22.

(2) Countess of Rutland's case, 5 Rep. 26. Buckler v. Millerd, 2 Ventr. 107. Tinney v. Tinney, 3 Atk. 8. 1 Wils. 34. Haynes v Hare, 1 H. Black. 659. Clifton v. Walmesley, 5 T. R. 567.

(3) Mease v. Mease, Cowp. 47.

(4) 2 Roll. Abr. 786. (N), pl. 1. Mildmay's case, 1 Rep. 176. Lord Cromwell's case, 2 Rep. 76. Bedell' case, 7 Rep. 38.

averred, that the bargainee gave money or other valuable consideration.(1) That such an averment may be taken, which stands with the deed, says Lord Coke, although it be not expressly comprised in the deed, is proved by the case of Villers and Beamont (2), where the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred and found by the jury, that the indenture was made "as well in consideration of marriage (to make it a jointure and bar dower) as of the said sum of money;" and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it.* A fortiori, adds Lord Coke, the averment may be made,

(1) 2 Roll. Ab. 786. (N). 1 Rep. 176.

(2) 2 Dyer, 146. a. Vernon's case, 4 Rep. 3. S. P. And see Cray-thorne v. Swinburne, 14 Ves 170.

* In the case of Villers and Beamont, above cited, (2 Dyer, 146. a.) an elaborate argument is to be found in support of the position, that "where a consideration is expressed in a deed of gift or grant, no other cause can be averred; but if no cause is expressed, that a cause may then be averred out of the deed." The report adds, "that three Judges argued to the contrary, and that the effect of that which is found by the assignment of, "as well in consideration of the said marriage, &c. as of the sum, &c. *is contained within the indenture, and so their finding is not contrary to it.*" In the case of Peacock v. Monk, (1 Ves. 128.) Lord Hardwicke makes the same distinction. A bill in that case was filed, claiming the benefit of a trust under a deed, and the point was, whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord Hardwicke held that the proof ought to be read. "It differed," he said, "from the common case upon which the objection is founded; for to be sure, where any consideration is mentioned, as of love and affection only, if it is not said also, 'for other considerations,' you cannot enter into proof of any other; the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." All the authorities agree, that, where the deed is not impeached for fraud or other illegal matter, no consideration can be averred or proved contrary to that

where no consideration is mentioned, but the deed is general, "for divers good considerations;" for then the averment (that the bargainee gave money, &c.) is but an explanation and particularising of the general words of the deed, which include every manner of consideration; and in all these cases, cases the matter so averred is traversable and issuable. And Lord Hardwicke has held, that where no consideration is expressed in the deed, a party, claiming the benefit of a trust under the deed, may prove a valuable consideration. (1)

In a case of settlement also, where the question was, whether a settlement had been gained by the purchase of an estate within the statute 9 G. 1. c. 7. s. 5., parol evidence was adjudged to be admissible to shew, that the parties, after having agreed upon twenty-eight pounds as the purchase-money, (which was the consideration expressed in the deed of conveyance,) made a subsequent unwritten agreement before the execution of the deed, that the consideration should be increased to thirty pounds, and that the latter sum was actually paid. (2) Here the object of the proposed evidence was not to contradict the indenture, but to ascertain an independent collateral fact, namely, whether thirty pounds had been *bonâ fide paid* as a consideration for the purchase of the estate, upon which fact the settlement would depend.

The general rule is, that a party to a deed will be precluded from shewing a condition or consideration contrary to what is expressed in the deed. An exception, however, is always to be made, where the consideration has been illegal, as for simony, usury, compounding of felony, &c. (3)

2. Proof of different consideration, in case of fraud, &c.

(1) Peacock v. Monk, 1 Ves. 128.

(2) R. v. Scammonden, 3 T. R. 474., cited in Rich v. Jackson, 6 Ves. 337. n.

(3) Buckler v. Millerd, 2 Ventr. 107. Collins v. Blantern, 2 Wils. 347.

expressed in the deed; and further, the cases referred to in the text appear to have established, that it is not considered to be contrary to or inconsistent with a deed, to prove another consideration in addition to the consideration expressed.

In an action of debt upon a bond, the defendant may plead, that the bond was given for an usurious consideration, though a different and a legal consideration may be recited. And when fraud is imputed, the party, who complains of the fraud, may prove any consideration, however contrary to the averment in the deed, to shew the fraudulent nature of the transaction. (1) Thus, where the considerations mentioned in the deed were ten thousand pounds and natural love and affection, the lords commissioners of the great seal directed an issue, to try whether natural love and affection formed any part of the consideration, the estates conveyed by the deed being worth thirty thousand pounds. On an appeal this was confirmed; and the jury, on the trial of this issue, finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the Court of Chancery. (2) So, when the question is, whether a person has gained a settlement in a parish by purchasing an estate, within the statute 9 G. 1. c. 7. s. 5., evidence is admissible to shew, that less than thirty pounds was the consideration, though the deed of conveyance may express a greater consideration; for that act of parliament says, that no person shall gain a settlement, &c. by virtue of any purchase, unless the consideration for such purchase shall amount to the sum of thirty pounds bonâ fide paid. (3) And for the purpose of setting aside a will on the ground of fraud, parol evidence may be given of what passed at the time of the testator's signing, and what the testator said; as in the case of Doe on the demise of Small v. Allen (4), where it was proved, that the testator at the time of the execution asked, whether the contents of the will were the same as those of a former will, the answer to which was in the affirmative, when in fact the contents were different. So, where indentures or other writings are not available in evidence, unless the consideration paid or contracted for is truly stated, it may be proved that a greater sum than is mentioned

(1) Bull. N. P. 173.

(2) Filmer v. Gott, 4 Bro. Parl. C. 234 2d edit.

(3) R. v. Mattingley, 2 T. R. 12. R. v. Olney, 1 Maule & Selw. 387.

(4) 8 T. R. 147.

was actually paid, or that the writing does not contain the whole of the agreement, but that some of the terms of the agreement were omitted for the purpose of evading the provisions of the stamp acts. In these and similar cases the general reason against admitting parol evidence will not apply; the danger is, not that the admission of such evidence would introduce fraud or uncertainty, but that fraud would be assisted by its exclusion, the whole object of the evidence being to expose and defeat a secret fraud.

But although a party, who impeaches a deed for fraud, may prove a different consideration, the party, charged with the fraud, will not be allowed to prove any other consideration in support of the instrument. Thus, where a bill was filed to set aside as fraudulent a conveyance, expressed to be made in consideration of an annuity, and on the part of the defendants it was objected, that the grantor of the estate had often declared, "he would rather that his kinsman, one of the defendants, should have the estate in consideration of this annuity than any other person for a more valuable consideration, and that he was willing to give the premises to his kinsman;" the Master of the Rolls, after stating that the deed and the answer had put the defence on another ground, declared, that it would be of mischievous consequence and liable to the danger of perjury, which the statute of frauds intended to prevent, to suffer parol evidence to prove blood and kindred to have been the consideration of this conveyance. (1)

3. Proof of delivery of deed at a different time.

As a deed takes effect from the time of delivery, not from the time of the date, it may be proved to have been delivered either before or after the day when it purports to have been made. In an action of debt upon a bond, the plaintiff may declare on a bond bearing date on a certain day, and prove the delivery on another day (2); or may state in his pleading, that the deed was indented, made, and con-

(1) Clarkson v. Hanway, 2 P. Wms. 203. 2 Schoal. & Lef. 501.

(2) Goddard's case, 2 Rep. 4. b.

cluded, on a different day from that on which the deed itself professes to have been indented and concluded. (1)

4. Proof of customary right, not expressed in the deed, when admissible.

Extrinsic evidence may sometimes be admitted to establish a customary right between a landlord and tenant, though such customary right is not expressed in the deed or lease, provided that it is not inconsistent with any of the stipulations. Thus, it may be shewn, that a heriot is due by custom on the death of a tenant for life, though not expressed in the lease. (2) And a lessee by deed may be entitled to an away-going crop by the custom of the country, though no such right is reserved by the deed. This was determined in the case of Wigglesworth v. Dallison (3), which was an action of trespass for cutting down corn, which the plaintiff claimed as his away-going crop after the expiration of a lease by deed. The jury found the existence of the custom; and it was afterwards moved, in arrest of judgment, that such a custom was repugnant to the deed; and to that effect a case was cited, which had been determined ten years before by Mr. Justice Yates. But the Court of King's Bench held, that the custom was not repugnant. They considered such a customary right as consequential to the taking, in the same manner as a heriot may be due by custom, though not mentioned in the grant or lease. The right was entirely collateral, and not excluded by the deed, which contained no stipulation whatever applicable to the subject. But where the lease contains a covenant, which in express terms, or by plain and necessary implication, excludes the customary right, there the benefit of the custom is waved, and cannot be claimed consistently with the stipulations of the lease. (4)

5. Evidence not admissible to vary the time of holding.

A demise of lands by deed, to commence from *Michaelmas-day*, must be understood to be from *New Michaelmas*, since the act of Parliament for altering the stile; unless there is some re-

(1) Stone v. Bale, 3 Lev. 348. Hall v. Cazenove, 4 East, 477.

(2) Per Cur. in White v. Sayer, Palm. 211.

(3) 1 Doug. 201. This judgment was affirmed in the Exchequer Chamber. The case of Senior v. Armitage, Holt, N. P. C. 197., is another instance.

(4) Webb v. Plummer, 2 Barn. Ald. 746.

ference in the deed to a prior holding from *Old Michaelmas*, to shew what the parties intended by using generally the term *Michaelmas-day*. The general term, *Michaelmas*, being thus fixed by law to mean New Michaelmas, and nothing appearing in the deed from which a different use of the term can be presumed, no parol evidence can be received to explain the time of holding stated in the deed. (1) In an earlier case at Nisi Prius, where the tenancy was from Michaelmas generally, Lord Kenyon appears to have admitted evidence, that by the custom and usage of the country Michaelmas holdings were from *Old Michaelmas*, and always so understood. (2) And in the case of old parol tenancies from year to year, where the time of entry cannot be ascertained, and where the receipts of rent have been general, such evidence seems not unreasonable.

Policies of insurance. Charter-parties.

Policies of insurance are within the same rule, and cannot be contradicted or varied by any written agreement made by the parties before the time of signing the policy. Thus, in an early case, where, in an action on a policy of insurance from Archangel to Leghorn, the defendant attempted to shew, that the agreement before the subscription of the policy was, that the adventure should begin only from the Downs, the Court would not admit the evidence. (3) Lord Chief Justice Pemberton in that case said, that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he who subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on condition, &c., when it may be that the bill had been negotiated; for though neither of them are spe-

(1) Doe dem. Spicer v. Lea, 11 East, 312. In this case, the tenant first held from *Old Michaelmas* by parol, then took a lease by deed from *Michaelmas*, and, after the expiration of that lease, held on without any new agreement.

(2) Furley dem. Mayor of Canterbury v. Wood, 1 Esp. 198., cited by counsel in Doe v. Lea. Upon its being cited, the Court asked whether the lease was by deed. The report does not state that fact.

(3) Kaines v. Knightly, Skin. 54. S. C., referred to in Bates v. Grabham, 2 Salk. 444., but mis-stated. Weston v. Emes, 1 Taunt. 115. Uhde v. Walters, 3 Campb. 16.

cialties, they are of great credit, and much for the support and advantage of trade. The same rule of course applies to charter-parties. Where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth. (1)

Promissory note.

In an action on a promissory note or bill of exchange, the defendant will not be allowed to give evidence of an agreement between him and the plaintiff, at the time of making the note, that it should be renewed, and that payment should not be demanded on its becoming due. (2) Nor is parol evidence admissible to shew, that a note, purporting to be payable on demand, was intended by the parties to be payable only on a contingency (3); or that a note, payable on a certain day, was intended to be payable on some other day. (4) That the note was given on an illegal consideration, may certainly be proved, for a reason before mentioned (5); but no parol evidence can be received inconsistent with the terms of the note. The usage in a public office, from which the note or bill issues, will not be allowed to control the legal import of the instrument. (6)

Contract for seaman's wages.

In the case of contracts of hiring also, between masters of ships and seamen, (though they are directed by statute to be in writing under a penalty to be inflicted on the master, and it has not been decided that they are void, if unwritten,) still, when once reduced into writing, they cannot be varied or added to by parol. Thus, it was ruled in the Court of Common Pleas, that a mate in a slave-ship could not, on the ground of a verbal promise, claim the perquisite of the price of a negro slave beyond the wages due to him by certain

(1) Leslie v. De la Torre, cited 21 East, 583

(2) Hoare v. Graham, 3 Campb. 57. Hogg v. Snaith, 1 Taunt. 347.

(3) Rawson v. Walker, 1 Starkie, 361. Woodbridge v. Spooner, K. B. Mich. T. 24 Nov. S. P.

(4) Free v. Hawkins, 1 Moore, Rep. C. P. 535.

(5) See ante, p. 584.

(6) Hogg v. Snaith, 1 Taunt. 347.

written articles of agreement executed between the master, officers, and crew. (1)

Usage of merchants to explain mercantile contracts.

However, it has been long determined by a variety of cases, that mercantile contracts, such as policies of insurance, charter-parties, and others of a like nature, are to be construed conformably with the usage and custom of merchants. On mercantile contracts relating to insurance, said Lord Hardwicke in a case before him, courts of law examine and hear witnesses, as to the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction. (2) Thus, where an insurance was on a ship from London to the East Indies, warranted to depart with convoy, the Court held, that this clause of warranty must be construed according to the usage among merchants, that is, from such place where convoys are to be had, as from the Downs. (3) So, where the insurance is on goods till landed, and the defence is, that the plaintiff has been guilty of unreasonable delay in landing, the question can only be decided by knowing the usual practice of the trade, with which every underwriter is supposed to be acquainted, whether the practice has been recently or long established. (4)

It has indeed been doubted by Judges of the highest authority, whether the practice of admitting such evidence has not been carried to an inconvenient length. In the late case of Anderson v. Pitcher (5), Lord Eldon C. J. expressed himself in the following terms: "It is now too late to say, that this warranty is not to be expounded with due regard to the usage

(1) White v. Wilson, 2 Bos. & Pull. 116.

(2) 1 Ves. 459. 2 Ves. 331. Edie v. E. In. Comp. 2 Burr. 1216. Chaurand v. Angerstein, Peake, N. P. C. 43. Cochran Retberg, 3 Esp. N. P. C. 121. Uhde v. Walters, 3 Campb. 16. Birch v. Depeyster, 1 Starkie, 210. 4 Campb. 385. S. C. The cases on this subject are stated in Park's Treat. on Insurances, p. 49—101., last edit.

(3) Lethulier's case, 2 Salk. 443.

(4) Noble v. Kennoway, 1 Doug. 510. Vallance v. Dewar, 1 Campb. 503.

(5) 2 Bos. & Pull. 168.

of trade. Perhaps it is to be lamented, that in policies of insurance parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great Judge Lord Holt. (1) It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of a great part of this law, expressed himself thus: 'Wherever you render additional words necessary and multiply them, you also multiply doubts and criticisms.' (2) Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were res integra, be reasonably questioned."

But though the usage of merchants, with reference to which the parties are supposed to contract, may be frequently resorted to for explaining or defining the terms of a policy, it is not therefore to be supposed, that this species of contract is not subject to the same rules of construction as are applicable to other written instruments. The same rules of construction apply to every kind of contract. The terms of a policy are to be understood in their plain, ordinary, and proper sense, unless they have generally, in respect to the subject-matter, (as by the known usage of trade or the like,) acquired a peculiar sense distinct from the popular sense of the words; or unless the context evidently points out, that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense. (3) Proof of usage is not admissible to contradict the plain unequivocal language of a policy; and therefore in an action on a policy of insurance "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been admitted, that by the custom of the trade the

(1) Lethulier's case, 2 Salk. 443.
(2) Lilly v. Ewer, 1 Doug. 74.
(3) By Lord Ellenborough C. J. in delivering his judgment in Robertson v French, 4 East, 135. Birch v. Depeyster, 4 Campb. 385. Chaurand v. Angerstein, Peake, N. P. C. 43.

risk on the goods, as well as on the ship, expired in twenty-four hours, the Court of King's Bench granted a new trial on that ground, and on the new trial the evidence was rejected. (1) Evidence of usage of trade, which contradicts the express words of a contract, is clearly inadmissible. (2)

This doctrine of admitting evidence of usage to explain and construe mercantile contracts is strongly illustrated by the case of Cutter v. Powell (3), which was an action of assumpsit brought by an administratrix for work and labour done by the deceased. It appeared that the captain of a ship had given a note to the deceased, by which he promised to pay a sum of money to the deceased, provided that he proceeded on a voyage, and continued to do his duty as second mate, to the port of destination. The second mate died on the voyage, and the question was, whether the plaintiff could recover in this general action any portion of the wages for the time the deceased had served. An enquiry had been made by the direction of the Court relative to the usage of merchants on this kind of agreement; but no settled usage could be ascertained one way or the other. Lord Kenyon in delivering his opinion, after stating, that the deceased stipulated to receive the larger sum, if the whole duty were performed, and, unless the whole were performed, to receive nothing, added, that on this particular contract his opinion was at present formed; at the same time, said Lord Kenyon, if we were assured, that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my opinion. And Mr. Justice Lawrence said, "With regard to the common case of an hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he

(1) Parkinson v. Collier, sitt. after Mich. 1797, Park. Insur. 416.

(2) Yeats v. Pim, 2 Marshall, Rep. 141.; Holt, N. P. C. 95. S. C.

(3) 6 T. R. 320.

serves, though he does not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage, that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, the plaintiff cannot recover any thing."

Agreements within the statute of frauds.

The same rule applies to all such written agreements, as are required by the statute of frauds to be in writing. They cannot be contradicted, or added to, or substantially varied by parol evidence (1); for such evidence would defeat the statute, and introduce that uncertainty, which it was the object of the legislature as far as possible to suppress. Where the rent for a house was specified in a written agreement to be twenty-six pounds a year, and the landlord in an action for use and occupation proposed to shew by parol evidence, that the tenant had also agreed to pay the ground-rent, the Court refused to admit the evidence. (2)* So, where a tenant, having paid the land-tax, brought an action to recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's hand-writing, which specified the rent and terms, but was silent respecting the payment of

(1) Binstead v. Coleman. Bunb. 65. Parteriche v. Powlet, 2 Atk. 383. Meres v. Ansell, 3 Wils. 275. Wain v. Warlters, 5 East, 10. Hope v. Atkins, 1 Price, 143. Bartlett v. Pickersgill, 1 Cox, Ch. C. 15.

(2) Preston v. Merceau, 2 Black. 1249.

* In the case of Preston v. Merceau, above cited, Mr. Justice Blackstone, after stating, that the Court could neither alter the rent nor the term, the two things expressed in the agreement, is reported to have added, "that with respect to collateral matters it might be different; the plaintiff might shew, who was to put the house in repair, or the like, concerning which nothing is said." But this opinion is not consistent with the principle established in Meres v. Ansell (3 Wils. 275.), Rich v. Jackson (4 Bro. Ch. C. 515.), Powell v. Edmunds (12 East, 6.), and several other cases above mentioned, which plainly shew, that parol evidence is not admissible either to vary or to add to the terms of the written agreement. To add a new term, or to define what was before indefinite, is in effect to make a material variation.

taxes, the defendant offered parol evidence, that, previously to the drawing up of the memorandum, it had been mentioned and was understood by the parties, that the rent was to be paid clear of all taxes; this evidence was rejected, and the Court of Common Pleas afterwards, on a motion for a rule to shew cause why the verdict should not be set aside, adjudged the evidence to be inadmissible, and refused the rule. (1)

Upon the same principle, the verbal declarations of an auctioneer at the time of sale are not admissible in evidence for the purpose of varying, or adding to, or explaining the printed conditions of sale. (2) Thus, where the conditions described only the number and kind of timber trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not allowed to prove, that the auctioneer at the sale had warranted the quantity of timber to amount to a certain weight, and the Court of King's Bench was of opinion, that this evidence had been properly rejected. (3) Lord Ellenborough said, that " the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, in what instance might not a party by parol testimony superadd any term to a written agreement? which would be setting aside all written contracts, and rendering them of no effect. There is no doubt, that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale."

So, when a contract is made for the sale of goods, and the bargain has been reduced into writing, pursuant to the

(1) Rich v. Jackson, 4 Bro. Ch. C. 515. 6 Ves. 334. n. S.C.

(2) Gunnis v. Erhart, 1 H. Bl. 289. Jenkinson v. Pepys, cited 6 Ves. jun. 330. Higginson v. Clowes, 15 Ves. 516. Clowes v. Higginson, 1 Ves. & Beam. 524. Winch v Winchester, 1 Ves. & Beam. 378. Ogilvie v. Foljambe, 3 Merivale, 53.

(3) Powell v. Edmunds, 12 East, 6.

17th section of the statute of frauds, parol evidence would not be admitted to shew that the parties agreed to vary the quantity of goods to be delivered. But the rule is different with respect to the time of delivery, or the particular mode of delivery, which are not essential parts of the contract, but are frequently expressed in the memorandum, together with the quantity and the price of the goods, in order the more easily to carry the contract into execution; proof of a verbal agreement has therefore been allowed to prolong the time limited in a written contract for the delivery of a certain quantity of barley (1), on the ground that it was only a continuance of the original contract, a forbearance on the part of the plaintiff for a longer time. And in a very late case, where the question was, whether after a part-delivery of goods, which by a written contract were to be delivered at fixed times, a verbal agreement to extend the time for the delivery of the remainder was good, the Court of King's Bench held, that it was good (2); for this was not a parol variation of the contract, but what had been done was only in performance of the original contract; the parties agreed to a substitution of other days instead of those originally specified for its performance, but still the contract remained. Parol evidence is also admissible to shew that a written contract, purporting to be made between A. and B, as seller and buyer, was in fact made by B. not on his own account, but as agent for a third person. (3)

Contracts not within the statute of frauds.

By the rule of law, independently of the statute of frauds, parol evidence cannot be received to contradict a written agreement; the written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. (4) The reason, assigned by Lord Coke, against admitting parol evidence to contradict the terms of a deed, is very general, and applies to the case of a written agreement, though writing may not have been absolutely necessary. "It

(1) Warren v. Stagg, ruled by Buller J., cited in 3 T. R. 591.

(2) Cuff v. Penn, 1 Maule & Selw. 21.

(3) Wilson v. Hart, 7 Taunt. 295; 1 Moore, C. P. 45, S. C.

(4) 2 Atk. 383. 2 Bro. Ch. C 219. 7 Ves. 218. 4 Taunt. 786.

would be inconvenient," he says, "that matters in writing, made on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory." (1) Thus, where there has been a contract in writing for the sale of goods, specifying the quantity and the price, neither of the contracting parties would be allowed to give evidence of conversations *previous to*, or *co-temporaneous with* the bargain, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered; for this evidence would directly contradict the written memorandum, which must be considered as expressing the final intention and understanding of the parties at the time of the contract. For the same reason, if the time of carrying away the goods is not expressed in the agreement, in which case a reasonable time is allowed, evidence will not be admitted to shew, that the purchaser verbally agreed to carry them away immediately after the purchase. (2)

But if it were not necessary in the first instance to have the bargain reduced into writing, evidence of conversations *subsequent* to the time of making the agreement would probably be admitted, to shew that the parties agreed afterwards to vary the contract, or add some new stipulation. Here the written agreement, so far as it purports to express the true meaning of the parties, that is, down to the time of its being concluded, is not in any manner contradicted or impugned; but from the proposed evidence it would appear, that they afterwards varied or added to the contract; which is not inconsistent with any thing contained in the original agreement. Lord Hardwicke is reported to have said in a case before him (3), that "to add any thing

(1) 5 Rep. 26.

(2) Greaves v. Ashlin, 3 Campb. 426. See Jeffery v. Walton, 1 Starkie, 267, where, in an action for not taking proper care of a horse, which the defendant had hired, the time of hiring and price were proved by a written memorandum, and it was proved by parol evidence, that the defendant agreed to be liable for all accidents. It does not appear from the report, whether the written memorandum was signed by the defendant; if it was not signed, it cannot be considered as evidence of the agreement. See Ingram v. Lea, 2 Campb. 521.

(3) Parteriche v. Powlet, 2 Atk. 384. See Clinan v. Cooke, 1 School. & Lef. 35.

to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds, but to the rule of common law, before that statute was in being." It is not, however, expressly stated in the report of the case before Lord Hardwicke, whether the circumstance to which the parol evidence related, was previous or subsequent to the signing of the agreement; but it seems rather probable from the nature of the case, that it was previous.

Proof of collateral facts to shew intention.

Though an ambiguity apparent on the face of a written instrument cannot be explained by extrinsic evidence, yet where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, it has been held, that proof of independent facts collateral to the instrument may be properly admitted. Thus, in the case of King v. Laindon (1), on a question between two parishes respecting the settlement of a pauper, where it appeared that the pauper agreed to serve a person three years to learn the business of a carpenter, and evidence was admitted at the sessions, that, at the time of making this agreement, the pauper agreed also to give a sum of money as a premium to be taught the trade; that he paid the money, and that he was not to be employed, nor was he employed, in any other work than that of a carpenter; the Court of King's Bench held, that the evidence was properly admitted, as it was not offered to contradict the written agreement, but to ascertain an independent fact collateral to the written instrument, in order to explain the intention of the parties, the instrument being in some measure equivocal. It does not distinctly appear from the report, whether the fact alluded to was the verbal agreement, (by which the pauper agreed to pay a premium, and stipulated that he was to do only carpenter's work,) or only the payment of a certain sum of money by the pauper to the master at the time, when the agreement was made. But from the opinions expressed by the Court, in which the evi-

(1) 8 T. R. 379. And see 14 Ves. 170.

dence of the verbal agreement was not adverted to, it may be inferred, that the latter fact alone was judged to be admissible. Lord Kenyon said, "The evidence was offered to ascertain an independent fact, and I think it was properly received in evidence. That being so, the case appears to be shortly this: in consideration of three guineas paid by the pauper, the master undertook to teach him the business of a carpenter, and the pauper was to serve three years." Mr. Justice Lawrence expressed himself nearly in the same words; and Mr. Justice Le Blanc concurred in opinion with the Court, that the parol evidence was admissible, as evidence of a fact collateral to the written instrument. (1)

Parol agreements discharged by parol.

A deed cannot be discharged or revoked by parol; for every contract or agreement, says Lord Coke, ought to be dissolved by matter of as high a nature as the first deed; nihil tam conveniens est naturali æquitati, quam unumquodque dissolvi eo ligamine, quo ligatum est. (2) This reason is applied by Lord Coke only to agreements by specialty. But it appears to be generally understood, that executory agreements in writing, not under seal, may before breach be discharged and abandoned by a subsequent unwritten agreement, as well in cases where the original contract is required by the statute of frauds to be in writing, as where writing is unnecessary. Agreements, not by specialty, whether written or unwritten are classed on the same level, and denominated agreements by parol; there is no such third class recognised by the law of England as contracts in writing not under seal; if they are merely written, and not specialties, they are called parol (or, more properly, simple) contracts. (3) It follows, therefore, that to admit evidence of an unwritten agreement, for the purpose of shewing an abandonment or discharge of a previous written agreement, would not be to dissolve the agreement by matter of an inferior nature. Nor does the statute of frauds contain

(1) See also 14 East, 544.
(2) 5 Rep. 26. a. 3 Lev. 234. Blake's case, 6 Co. Rep. 44. a. Braddick v. Thompson, 8 East, 344.
(3) Rann v. Hughes, 7 T. R. 350. n.

any provision respecting the dissolution of agreements; it prescribes the manner of revoking wills, and in many cases makes a written memorandum necessary in order to establish and enforce agreements, but as to the discharge or abandonment of executory agreements the statute is entirely silent, leaving the case as it stood at common law. The 17th section enacts, in certain cases, that "*a contract for the sale of goods* shall not be allowed to be good, unless some note or memorandum, in writing, of the bargain shall be made and signed," &c.; but an agreement to wave that contract, before breach, is not a contract for the sale of goods, and may therefore be binding, though not reduced into writing. So, the fourth section enacts, that "no action shall be brought *upon any contract or sale of lands*, &c., or any interest in or concerning them, unless the agreement, upon which the action shall be brought, or some memorandum or note thereof, shall be in writing," &c.; this is very different from enacting, that all contracts or agreements *concerning* land shall be in writing, terms so general and comprehensive that, if they had been introduced into the act, they might be considered as including an agreement for the waver of a purchase-contract, as well as the original agreement itself; the section only provides, that *no action shall be brought upon any contract or sale of lands,*" &c., but it does not proceed to enact, in case an action is brought, and the defence set up is a dissolution and abandonment of the agreement, that some note or written memorandum is also necessary to give effect and validity to such subsequent agreement.

On a bill filed in a court of equity for the specific performance of a written agreement, it appears to be the better opinion, that the defendant may insist, that the agreement has been since discharged merely by parol between the parties.(1) In the case of Buckhouse and Crossby (2), indeed, where a bill was filed for the specific performance

(1) Goman v. Salisbury, 1 Vern. 240., cited and approved by Sir J. Strange in Legal v. Miller, 2 Ves. 299., and in Pitcairne v. Ogbourne, 2 Ves. 376., and cited by Lord Chancellor Redesdale in 1 Schoal. & Lef. 39. 2 Ves. 299. S. P. 1 Ves. jun. 404. S. P. 17 Ves. 356. S.

(2) Eq. Cas. Ab. 32.

of a contract for the sale of an estate, and the defendant insisted that the contract had been discharged by parol, in support of which the case of Goman v. Salisbury was cited as an authority, Lord Hardwicke is reported to have declared, that, "though he would not say, that a contract in writing could not be waved by parol, yet he should expect in such a case a very clear proof, and the proof in the case before him he thought very insufficient to discharge a contract in writing;" Lord Hardwicke then observed, that the statute of frauds requires, "that all contracts and agreements concerning land should be in writing (1), and that an agreement to wave a purchase-contract is as much an agreement concerning land as the original contract; however, there was not occasion then to determine the point."* And in the case of Bell v. Howard (2), Lord Hardwicke, after noticing an objection on the part of the defendant against decreeing an execution of written articles for the sale of an advowson, (namely, that the plaintiff had waved the articles,) is reported to have said, that "it was certain an interest in land could not be parted with or waved by naked parol without writing;" but added, "that articles may by parol be so far waved,

(1) This is not quite correct. See ante, p. 598. (2) 9 Mod. 302.

* In this case of Buckhouse and Crossby, the waver was not between the purchaser and vendor, but between a former and a subsequent purchaser. The material facts of the case will be found to be, that A. seised of lands in fee-simple mortgaged them to the defendant, and afterwards authorised his attorney to sell the estate, who sold it by parol agreement to the plaintiff; A. being informed of this wrote to the plaintiff, acquainting him, that he accepted the purchase-money: afterwards A. by letter offered the estate for the same money to a third person, who agreed with A. for the purchase on behalf of the defendant, and accordingly A. by indenture conveyed the premises to the defendant in consideration of 300 guineas then paid. Before this conveyance, C., who treated for the purchase on behalf of the defendants, had notice of the plaintiff's title, but being examined as witness for the defendant, swore that, before the conveyance was executed to him, the plaintiff agreed, that all prior contracts between him and A. should be void, and that it should be referred to A., whether the plaintiff or the defendant should be the purchaser, and that A., being written to, gave the preference to the defendant.

that if the party come into a court of equity to have a specific execution of them, such parol-waver will rebut the equity which the party before had, and prevent the court from executing them specifically." But, in the last case on this subject (1), where the plaintiff prayed a specific performance of an agreement for a lease, under which the plaintiff had taken possession, and afterwards, as the defendant stated in his answer, the parties mutually abandoned the terms of the written agreement, and made another agreement by parol, the Master of the Rolls, observing upon the argument for the defendant, "that the agreement was waved, and that a written agreement may be so far waved by parol, that the Court will refuse the interposition of its equitable jurisdiction to enforce it," said, that as he conceived there was not in the case before him any waver within the meaning of the dicta or the decisions upon the subject, it was not necessary for him to give any precise opinion upon the point; "but," he added, "as at present advised, I incline to think, upon the doctrine of this court, such would be the effect of a parol waver clearly and satisfactorily proved. The waver spoken of in the cases is an entire abandonment and dissolution of the contract, restoring the parties to their former situation. No such thing was for a moment in the contemplation of the parties. All that they at any time meant was to add to or modify the terms of the original agreement." The bill was accordingly dismissed, but without costs.

Sect. III.

Of the Rule in Courts of Equity, respecting the Admissibility of Parol Evidence.

It would far exceed the proper limits of this treatise, to enquire into the rules observed by courts of equity, respecting the admissibility of parol evidence, on subjects within their peculiar jurisdiction. Such an enquiry would be long and laborious;

(1) Price v. Dyer, 17 Ves. 356. 363. See also 9 Ves. 250.

and the multitude of cases, which it would be necessary to cite, would, after all, be seldom wanted in the business of courts of common law. The only purpose of entering at all upon this subject, is with a view to mention some points very nearly connected with those in the last section.

The rules of evidence, in courts of equity are, in general, the same as in courts of common law; although, in the application of those rules, diversities must necessarily arise from the different modes of proceeding in the two jurisdictions. (1) It is a general principle, therefore, established in the former courts, no less than in the latter, that parol evidence of the intention of the parties is not admissible to vary or add to the terms of a written agreement. (2) If the agreement is certain, explained in writing, and signed by the parties, that binds them: if it is not certain, and parol evidence is necessary to prove what the terms were, to admit such evidence would effectually break in upon the statute of frauds and introduce all the mischiefs, inconvenience, and uncertainty, which the statute was designed to prevent. (3) In the case of Rich v. Jackson (4), therefore, on a bill for specific performance, the Court of Chancery gave the same judgment against the admissibility of parol evidence varying a written contract, as had been previously given by the Court of Common Pleas in an action between the same parties. "The question," said Lord Rosslyn in that case, "is, whether in equity any more than at law such evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement? I have looked into all the cases, and cannot find that this court has ever taken upon itself, in executing a written agreement by a specific perform-

General rule.

(1) 2 Merivale, 464.
(2) Fell v. Chamberlaine, 2 Dickens. 424. Hare v. Shearwood, 1 Ves. jun. 241. Jordan v Sawkins, 3 Bro. Ch. C. 388. 1 Ves. jun. 402. S. C. Jackson v. Cator, 5 Ves, 688.
(3) Buller J., Brodie v. St. Paul, 1 Ves. jun. 333.
(4) 6 Ves. 334. n.

ance, to add to it by any circumstance that parol evidence could introduce."

There are certain exceptions to this general rule, the principle of which will be briefly considered in the present section. First, it will be enquired, in what cases a *defendant* may prove by parol evidence a variation in a written agreement, contrary to the intention of the party; secondly, whether a *plaintiff* may produce such evidence. Some cases will then be mentioned, in which extrinsic evidence has been admitted, to rectify mistakes in deeds, and for the purpose of raising trusts in wills.

Rule, with respect to the party *charged.*

1. When a court of equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party *charged* is admitted to shew, that under the circumstances the plaintiff is not entitled to have the agreement specifically performed. (1) The admission of such evidence as matter of defence is very frequent; it is used to rebut an equity. The defendant says, "The agreement which you seek is not the agreement which I meant to enter into;" and then he is let in to prove fraud or mistake: (2) for the Court will not grant a decree for specific performance, unless it is satisfied, that under all the circumstances it is equitable to give more relief than the plaintiff is entitled to at law.

The statute of frauds has not altered the situation of a defendant, against whom a specific performance is prayed; and he may give the same evidence now, which he might have given before. (3) The words of the statute are, that "no person shall be charged upon any contract or sale of lands, &c., unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." No person, then, can be charged with the execution of an agreement, who has not either by himself or his agent signed a written agreement; but

(1) 7 Ves. 219.
(2) Lord Redesdale. 1 School & Lef. 39.
(3) 14 Ves. 524.

the statute does not say, that, if a written agreement is signed, the same exception to it may not be taken as before the statute. Now before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left by the statute, as it was before; the statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind. (1)

The general principle, to be deduced from the various authorities on this subject appears to be, that a defendant in answer to a bill for a specific performance may suggest, and prove by parol evidence, that by reason of fraud, surprise, or mistake, the written instrument does not correctly and truly express the agreement, but that there is an omission or insertion of a term, or some material variation, contrary to the intention and understanding of the parties. (2)

The defendant may be admitted also to prove by parol evidence, that, after signing the written agreement, the parties made a verbal agreement varying the former; provided those variations have been so acted upon, that the original agreement can no longer be enforced without a fraud upon the defendant. Thus, in a case where there was a written agreement for the lease of a house at the annual rent of 32l., and that the owner of the house should put it in repair; it was afterwards discovered, that the house was not worth repairing, and without any alteration of the agreement the house was in consequence pulled down with the consent of the tenant, who was apprised of the great expence, which the landlord must necessarily have incurred in making the repairs; the

(1) Lord Redesdale's judgment in the case of Clinan v. Cooke, 1 Schoal. & Lef. 39.

(2) Joynes v. Statham, 3 Atk 388. Marquis of Townsend v. Stangroom, 6 Ves. 328. Woollam v. Hearn, 7 Ves. 211. Clarke v. Grant, 14 Ves. 524. Ramsbottom v. Gosden, 1 Ves. & Beam. 165. Winch v. Winchester, 1 Ves. & Beam. 375.

tenant then made a verbal agreement to add 8l. per annum to the 32l., provided the house should be rebuilt; and on a bill brought by the tenant for a specific performance of the lease, on the foot of the written agreement to pay 32l. rent, the defendant in his answer set up the parol agreement. (1) Now here the original agreement was unexceptionable, but the execution of it under the new circumstances would have been a fraud upon the landlord; the landlord having rebuilt instead of repairing the house, and the tenant having agreed to pay an additional rent in consideration of the additional expence. The situation of the parties was therefore materially altered. But variations, verbally agreed upon, are not sufficient to prevent the execution of a written agreement, where the situation of the parties in all other respects remains unaltered. (2)

Rule, with respect to the *plaintiff* in equity.

2. Whether a *plaintiff* in equity, on a bill for the specific performance of a written agreement, can in any case be admitted to prove, that some terms of the agreement have been omitted or varied by *fraud*, *mistake*, or *surprise*, and that the agreement is different from what the parties intended; and whether, on such a case being distinctly proved, the plaintiff can obtain a decree for a specific performance of the agreement in its rectified form, is a much larger and more difficult question, and one on which it is not easy to reconcile all the authorities. In the cases of Lord Irnham v. Child (3), and Lord Portmore v. Morris (4), where the plaintiff filed a bill to redeem an annuity, and the question was, whether parol evidence could be admitted to shew, that the parties intended the annuity to be redeemable, but did not insert in the deed a clause to that effect, supposing that it would make the transaction usurious *; Lord Thurlow in the one case, and

(1) Legal v. Miller, 2 Ves. 299., cited 6 Ves. 336. n.; and 17 Ves. 364.

(2) 17 Ves. 364., and see Omerod v. Hardman, 5 Ves. 722.

(3) 1 Bro. Ch. C. 91.

(4) 2 Bro. Ch. C. 219.

* Lord Eldon has observed on these cases (*a*), that they proceed on an indisputably clear principle, that the parties did not mean to insert in the

(*a*) 6 Ves. 332.

Lord Kenyon in the other, thought it clear, that if the clause had been omitted by *fraud*, or if the agreement had been varied by *fraud*, the evidence would be admissible. Lord Thurlow, in the former case, after saying, that the rule of evidence is not subverted, if there is clear proof of *fraud*, added, — "Then as to *mistake* or *accident*, suppose it were a clear thing, that one agreement was intended, and that by accident it was extended further; but there is no such case in the book; if *admitted* to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity dehors the deed. Then it should be proved as much to the satisfaction of the Court, as if it were admitted." In another part of his judgment Lord Thurlow says, "It is necessary to see the statement of the bill; if it states, that it was agreed, that the clause for redemption should not be inserted, they cannot read the evidence; but if it is stated, that it was intended to insert the clause, but that it was suppressed by *fraud*, I cannot refuse to hear evidence read to establish the rule of equity. They are at liberty to read evidence to prove such *fraud*, as will make a ground in equity."

This doctrine respecting the propriety of receiving parol evidence on the part of the *plaintiff* under circumstances of clear *fraud*, appears to have been admitted in other modern cases. (1) The difficulty has generally been in carrying the principle into practice, and in ascertaining what constitutes a fraud. In the case of Pember v. Mathers (2), Lord Thurlow

(1) See Marquis of Townsend v. Stangroom, 6 Ves. 338.

(2) 1 Bro. Ch. C. 51.

agreement a provision for redemption, because they agreed that it would be usurious; and they desired the Court to do, not what they intended, for the insertion of that provision was directly contrary to that intention; but they desired to be put in the same situation as if they had been better informed and consequently had a contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties, the danger of usury, and the danger of trusting to the honour of the party?

allowed the plaintiff, on a bill for specific performance, to give parol evidence of a promise by the defendant under the following circumstances. The bill was filed by the original lessees of a leasehold estate against an assignee of the lease, on his parol undertaking to indemnify the plaintiff against all rents and covenants to be paid or kept on the part of the lessee, and to execute a bond for such an indemnity. The assignment had been made by a sale by auction; and the conditions of sale did not stipulate the indemnity; but it rested only on parol evidence. This evidence was objected to as inadmissible, on the ground that, where the parties have entered into a written agreement, no parol evidence could be admitted to increase or diminish such agreement. Lord Thurlow said, "the rule is right; but where the objection (to the omission of an article) was formally made, and promised by the other party to be rectified, it comes among the string of cases, where it is considered as a fraud upon the rule of law." As some doubt arose, whether the evidence was sufficient to establish the parol undertaking to indemnify, entered into by the defendants, Lord Thurlow directed an issue to be tried, whether such promise was made on the day of the execution of the assignment; and, this being found in the affirmative, the plaintiff had a decree for a specific performance. In speaking, however, of the case of Pember v. Mathers, the present Master of the Rolls appears to have entertained some doubt, how far it would be proper to go the length of the doctrine there laid down, or to decree a specific performance on the ground of such a promise. (1)

It does not appear from any reported case, that the *plaintiff* has been allowed to give parol evidence, varying a written agreement, on the ground of *mistake* or *surprise*. In the case of Joynes v. Statham (2), indeed, where, on a bill for the specific performance of an agreement for the lease of a house at a certain rent, the *defendant* was admitted to prove by parol evidence, that the agreement was for rent clear of all taxes,

(1) See 14 Ves. 524. (2) 3 Atk. 388

Lord Chancellor Hardwicke, after observing that "the defendant had a right to insist, *either on account of an omission, mistake, or fraud,* that the plaintiff should not have a specific performance," is reported to have added, — "Suppose the defendant had been the plaintiff, and had brought a bill for the specific performance of the agreement, I do not see but that he might have been allowed the benefit of disclosing this to the Court; because it was an agreement executory only, and as in leases there are always covenants relating to taxes, the master will enquire, what the agreement was as to taxes; and therefore the proof offered here is not a variation of the agreement, but is explanatory only of what those taxes were." Lord Redesdale in a very late case (1), commenting on this passage, observed, "that the words do not appear to import any thing positive;" and with respect to the case, which Lord Hardwicke conceived might possibly be made, where even a plaintiff might be admitted to shew an omission in a written instrument as well on the ground of *mistake* as of *fraud**, added, that he could find no decision except the contrary way.

In the case of the Marquis of Townsend v. Stangroom (2), Lord Eldon, after observing, "that it was competent to a court of equity (for the purpose of enabling it to determine, whether it will specifically execute an agreement,) to receive evidence of the circumstances under which it was obtained," added, "and I will not say, that there are no cases, in which it may be received to enable the Court to *rectify a written agreement upon surprise or mistake, as well as fraud:* proper irrefragable evidence, as clearly satisfactory, that there has

(1) Clinan v. Cooke, 1 Schoal. & Lef. 39. See also 4 Bro. Ch. C. 518. 6 Ves. jun. 335. n.; and 7 Ves. 220.

(2) 6 Ves. 338.

* The words of Lord Redesdale, in the report, are as follow: — "There seems to have been something of a floating idea in the mind of Lord Hardwicke, that by possibility a case might be made, in which even a plaintiff might be admitted to shew an omission, *either by mistake or fraud.* However I can find no decision except the contrary way.

been mistake or surprise, as, in the other case, that there has been fraud. I agree that those producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence." A specific performance was in this case sought, with a variation intended to be introduced by parol. And Lord Eldon stated, "he would not say, that, upon the evidence without the answer, he should not have had so much doubt whether he ought not to rectify the agreement, as to take more time to consider, whether the bill should be dismissed; but the evidence must be taken, due regard being had to the answer (1); and the Court is not to decide upon the allegation as to the probability against the answer." The bill was accordingly dismissed, but without costs.

The later case of Woollam v. Hearn (2), determined by the Master of the Rolls on great consideration, sets the doctrine of the courts of equity on this subject in a very distinct and clear point of view. The plaintiff there filed a bill for the specific performance of an agreement for a lease; the bill stated, that the rent of 73l. 10s., specified in the agreement, was inserted by mistake, or with some unfair view; the real agreement being, that the plaintiff was to have the lease upon the same rent, as the defendant paid to his lessor, and that he the defendant did not pay more than 60l. The defendant in his answer admitted, he might have said, that the plaintiff should have the lease upon the same terms, not meaning the same rent, but upon terms on the whole equally advantageous; insisting, that as he had laid out a great deal of money, the plaintiff would upon the whole have as good a bargain. The plaintiff offered parol evidence to prove, that he was to have it on the same terms as the defendant had it, and to shew, that nothing could be meant by the expression but the same rent; nothing being in discussion between them

(1) And see 1 Bro. Ch. C. 92. 3 Bro. Ch. C. 168. 1 Ves. jun. 241.

(2) 7 Ves. 211.

but the amount of rent. The question was, whether this evidence was admissible. The Master of the Rolls, in giving judgment, said that "by the rule of law, independent of the statute of frauds, parol evidence could not be received to contradict a written agreement. To admit it for the purpose of proving, that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that enquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any that parol can supply. If this had been a bill brought by the *defendant* for a specific performance," added the Master of the Rolls, "I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree; first, to falsify the written agreement, and then to substitute in its place a parol agreement to be executed by the Court. Thinking as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence, than I am forced by precedent. There is no case, in which the Court has gone the length now desired. But two cases (1) are produced, in which, it is said, there is an intimation from Lord Hardwicke to that effect. Upon this, it might be sufficient to say, it was not decided. But it is evident from the manner, in which that great Judge qualifies his own doubts, that he thought it impossible to maintain such a proposition, as the plaintiff is driven to maintain. In Walker v. Walker, it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting any thing in the written agreement. It was admitted, that, as far as it went, it stated the true meaning; but it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute, before he could have the benefit of the written agreement; it was evidence, too, offered in

(1) Walker v. Walker, 2 Atk. 98. Joynes v. Statham, 3 Atk. 388.

defence, to resist a decree. The evidence offered in this case," added the Master of the Rolls, concluding his judgment, "is to vary an agreement in a material part; and having varied it, to procure it to be executed in another form. There is nothing to shew that this ought to be done." The proposed evidence was accordingly rejected; and the bill dismissed, without costs.

Rule, in case of part-performance.

Where a written agreement has been varied by parol, and there has been such a part-performance of the parol variation, as would have procured it to be specifically executed, provided it had formed a part of the original agreement, the plaintiff in that case will be admitted to give evidence of such subsequent unwritten variation. As to what constitutes a part-performance, Lord Redesdale in a very late case (1) has laid down the following rule, that "nothing is to be considered as a part-performance, which does not put the party into a situation, that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement. This is put strongly in the case of Foxcraft v. Lister (2); there, the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to account for the rents and profits, because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge, which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That," said Lord Redesdale, "I apprehend to be the ground, on which courts of equity have proceeded, in permitting part-performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part-performance, which is not of that nature. Payment of money is not part-performance, for it may be repaid; and then the parties

(1) Clinan v. Cooke, 1 Schoal. & Lef. 41. 14 Ves. 368.

(2) 2 Vern. 456.

will be just as they were before, especially if repaid with interest. But the great reason, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, namely, with respect to goods, it shall operate as a part-performance; and the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant it should not bind in the case of lands."

Mistakes in deeds corrected.

3. Mistakes and misapprehensions in the drawers of deeds or of written agreements are a subject for relief in courts of equity, and may be rectified according to the true intention of the parties. (1) Thus, on a bill to rectify a mistake in a policy of insurance, which the plaintiff suggested to have been made too general and contrary to the intention of the parties, Lord Hardwicke said (2), there could be no doubt, but that the Court of Chancery had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against fraud in contracts; so that if reduced into writing, contrary to the intention of the parties, *on proper proof* that would be rectified. "This," as Lord Eldon has observed (3), "is loose in one sense, as it leaves to every Judge to say, whether the proof is that proper proof, which ought to satisfy him." The principal evidence on the part of the plaintiff, in this case, was the deposition of a witness, who had transacted the business for the Company (the defendants), but this evidence appeared to the Court not sufficiently certain to be relied upon. Lord Hardwicke observed, that the proof in such a case ought to be the strongest possible; and as it did not sufficiently appear to the Court, that the policy had been framed contrary to the intention and real agreement of the parties, the bill was dismissed. In the case of Baker v. Paine, on a bill filed for an account under a written agreement, the mi-

(1) 2 Atk. 203.

(2) Henkle v. Roy. Ex. Assur. Comp 1 Ves. 318., cited 6 Ves. jun. 333. See also Motteux v. Lond. Assur. Comp. 1 Atk. 545. Thomas v. Fraser, 3 Ves. jun. 399. 10 Ves. 227.

(3) 6 Ves. 333.

nutes and calculations, which had been previously made by the parties, were admitted in evidence, in order to prove a mistake made in the agreement by the person employed to draw it. (1) And in a variety of cases, where settlements have been drawn by mistake, contrary to the instruction of the parties, the mistake has been rectified by courts of equity, and the settlement made conformably to the instructions. (2) The Court, however, will expect full and satisfactory evidence of the mistake and misapprehension of the party's intention, before it will alter a settlement. In one case, where the parol evidence of the attorney, who had received verbal instructions, was offered, the Court held, that as nothing appeared in writing under the hands of the parties to shew their intention, the settlement could not be altered (3); and in another case, Sir Thomas Clarke is reported to have said, that he did not give a positive opinion as to the head of mistake, but he did not think the Court had relied on parol evidence only. (4)

Trusts raised in equity.

4. Provisions in wills have in certain cases been enlarged by parol evidence, and trusts in equity raised, as against executors or other persons claiming an interest under wills, where it has appeared that the testator intended to make a further provision in his will, but omitted to insert it on receiving a promise, that notwithstanding such omission, his intention should be carried into effect. Thus, in the case of Oldham v. Litchford (5), a witness was allowed to prove, that the defendant, who was the testator's executor and devisee of his real estate, had promised the testator, that he would pay the annuity bequeathed to the plaintiff, and that otherwise the testator would have charged the real estate with the payment. And on this evidence, it was decreed at the Rolls, that the real estate should be charged with the an-

(1) Baker v. Paine, 1 Ves. 457., cited in Rich v. Jackson, 6 Ves. 336. n.

(2) Randal v. Randal, 2 P. Wms. 469. Jenkins v. Quinchant, 5 Ves. 596. n. Barstow v. Kilvington, 5 Ves. 59. Burt v. Barlow, 3 Bro. Ch. C. 451.

(3) Harwood v. Wallis, cited 2 Ves. 195.

(4) 1 Dickens. 295. And see Shergold v. Boone, 13 Ves. 373. 376.

(5) 2 Vern. 506.

nuity: and this decree was afterwards affirmed on appeal to the Court of Chancery. In a later case (1), where a bill was filed against an executor and residuary legatee, to have a bequest enlarged, it appeared from a paper written by the defendant himself, that the testator, a few days before his death, had mentioned to him what he had bequeathed to the plaintiff, and that it was his wish that he should have a larger sum; it was further proved, that after the testator's death, when the paper was shewn to the defendant, he promised to perform the same according to the testator's request; another witness proved, that the testator mentioned to him in the presence of the defendant, the annuity which he had bequeathed to the plaintiff, and that it was his desire he should have a larger annuity, mentioning the sum; that the testator then requested the defendant to see such annuity paid to the plaintiff, and the defendant promised it should be done, as if it had been expressed in the will: and lastly, that the witness and the defendant desired the testator to send for some person to draw a new will, which the testator refused to do, saying he would leave it to the defendant's generosity. "Upon this evidence," said the Master of the Rolls, "the question is, whether, by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him, that if he did not put it in his will, he would not do it. Instead of that, he promised to do it; upon which the testator refused to make a new will. I am quite relieved," added the Master of the Rolls, "from any difficulty as to the statute of frauds. The question is, whether the confidence, that the defendant would perform the trust which he undertook, did not prevent the testator from making a new will." The Court accordingly ordered the defendant to pay the increased sum out of the assets, with costs; and, if the assets were not sufficient for the costs, that he should pay them personally.

(1) Barrow v. Greenough, 3 Ves. 152.

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